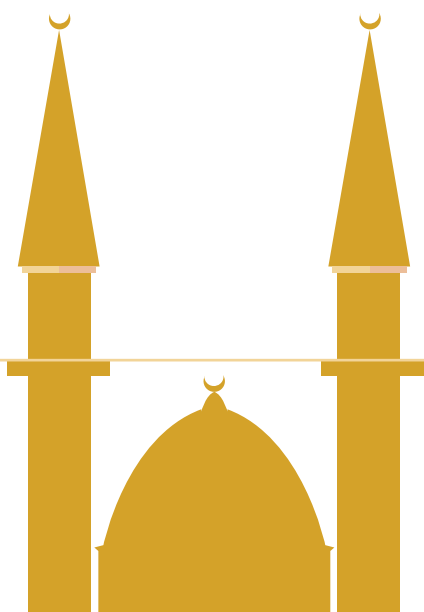




Democratization and the Politics of Constitution-Making in Turkey



Ergun Özbudun
and Ömer Faruk Gençkaya



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Ergun Özbudun and Ömer F. Gençkaya



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To Serap

E.Ö

To My Family

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Introduction

Constitution-making, particularly during democratic transitions, is an excellent opportunity to build political institutions that will enjoy broad support from society and its political (and other) elites. Both the constitution-making process and its outcome (i.e., constitutional choices) are crucial aspects of the transition to and consolidation of democracy. Andrea Bonime-Blanc has argued that

constitution-making is at once the most varied and the most concentrated form of political activity during the transition. In it, political maneuvering, bargaining and negotiations take place and the political positions, agreements and disagreements between groups and leaders come to the fore. How the constitution drafters handle these issues may tell us crucial things about the transition and about the regime it leads to. The general character of both the process and its outcome may reveal clues about the new regime's potential for stability or instability.¹

Put differently, the constitution-making process influences not only the mode of transition to democracy but also, and perhaps more importantly, prospects for the consolidation of democracy. We argue here that a consensual or consociational style of constitution-making tends to considerably increase the chances for democratic consolidation.

Thus, it seems no accident that some of the most stable democratic constitutions of the post-World War II period (the best-known examples are the German, Italian, and Spanish constitutions) are the products of broadly representative constituent assemblies and a highly consensual style of constitution making. In Italy, the Constituent Assembly elected in 1946 was dominated by three major parties (the Christian Democrats, the Socialists, and the Communists). Although

the Christian Democrats were the strongest party, the combined left-ist vote (Communists and Socialists) was greater than that of the Christian Democrats. The latter group, however, occupied the central position in the political alignment and could usually produce a realignment of all moderate and conservative forces around itself. Nevertheless, no single coalition dominated Italian constitution-making: "Instead, fluid coalitions and consensual decision-making took place on an issue by issue basis. ... Even in the face of ... potentially divisive issues, the process ... was completed on a consensual basis with most, if not all, political parties supporting the final version of the new constitution."² The Italian Constitution was praised as "a true political monument." As Gianfranco Pasquino observes: "So important was that period of collaboration, and so celebrated were its results, that to this day the Communists have stressed that they have little in common with the Christian Democrats, except for the fact that they drafted the constitution together."³

Similarly, the constitution-making process in post-Franco Spain was dominated by an accommodational, consensual style, which was encouraged by the results of the first free legislative elections on 15 June 1977. The center-right Central Democratic Union (UCD), under the leadership of Adolfo Suarez, emerged as the largest party, with 34.7 percent of the vote and 165 of 350 (47.1%) Cortes seats. The Socialist Party received 29.2 percent of the popular vote and 118 seats (33.7%). The two more ideological parties made disappointing showings: the Alianza Popular (AP), with links to the Francoist past, received only 8.5 percent of the vote; while the Communists obtained 9.3 percent of the vote. The new Cortes agreed at its first session that it would meet as a Constituent Assembly. The results of the elections left open the possibility of a rightist UCD-AD coalition in constitution-making, but the UCD rarely resorted to this option. Although there were intermittent winning coalitions between the two parties, especially on moral issues, "such a coalition was in no way comprehensive or predominant. Instead of displaying polarization, the Spanish process may be a model of consensual politics where parties of widely differing ideologies, through accommodation, formed the predominant multilateral (consensual) coalition."⁴

Through painstaking, and sometimes secret, deliberations compromises were reached between left and right on most fundamental constitutional issues. The consensual nature of the constitution-mak-

ing process is reflected in the fact that the Congress and the Senate adopted the Constitution almost unanimously, with only a few AP and Basque members voting against it or abstaining on 31 October 1978. This is also true of the constitutional referendum of 6 December 1978, at which the Constitution was approved by 87.87 percent of the popular vote.⁵

At the other end of the spectrum, one can observe a confrontational or dissentious style of constitution-making, the best examples of which are the 1946 French Constitution and the 1976 Portuguese Constitution. The French Constituent Assembly was dominated by three strong, disciplined, ideologically-oriented parties (the Communists, the Socialists, and the Christian Democratic Popular Republican Movement) that failed to arrive at consensual solutions on a number of important constitutional issues. Consequently, the first draft of the Constitution was rejected in the referendum, and the second was only narrowly adopted. Judging from the short life of the Fourth French Republic (1946–1958) and chronic government instability, this experience cannot be considered successful.

Similarly, the special circumstances that surrounded constitution-making in post-Salazar Portugal affected both the style and the outcome of the constitution-making process. Because of a majority of the leftist parties (the Socialists and the Communists) in the Constituent Assembly and the influence of radical leftist officers, the process can be described as essentially dissentious rather than consensual: “Decision-making, coalitions and results were ideologically one-sided and achieved unilaterally ... over the heads of the more centrist, second largest party, the People’s Democratic Party.”⁶ The 1976 Constitution was full of ideological, dogmatic, and often purely rhetorical provisions concerning the socioeconomic system; many of these ideological statements were eliminated or revised in the 1982 constitutional revision. Thus, the full consolidation of democracy in Portugal required two extensive constitutional revisions (in 1982 and 1989).

In light of such comparative evidence, the Turkish experience in constitution-making can be described as a series of missed opportunities to create political institutions based on broad consensus. None of the three republican constitutions (those of 1924, 1961, and 1982) nor the Ottoman Constitution of 1876 was written by a Constituent or a Legislative Assembly broadly representative of social forces or

through a process of negotiations, bargaining, and compromise. Consequently, they all had weak political legitimacy.

Indeed, Turkey offers a rich laboratory for an analysis of the politics of constitution-making. The first Ottoman Turkish Constitution was proclaimed in 1876, not much later than those of many European countries. This was the first constitution in the Islamic world, excluding the Tunisian Constitutional Charter (*destour*) of 1861, which, however, did not establish an even partially elected legislative assembly. Since then, the development of constitutionalism in Turkey has followed a checkered course. The proclamation of the 1876 Constitution was followed by the restoration of royal absolutism in 1878. The adoption of the 1924 Constitution was followed by a long single-party rule of the Republican People's Party (RPP; 1925–1946). More recently, the democratic process was interrupted three times by the military interventions of 1960, 1971, and 1980. Since the beginning of constitutionalism, Turkey has made five constitutions (those of 1876, 1921, 1924, 1961, and 1982), not counting the radical amendments of 1909, 1971, 1973, 1995, 2001, and 2004 and a much greater number of more minor amendments.

In the context of this work “constitutional government” should be understood to mean a system in which political power is shared and reciprocal controls are legally established among different branches of government, in other words, a system of “checks and balances.” In this sense constitutional government is not necessarily identical with “constitutional democracy” since the latter must, by definition, be based on effective and widespread political participation by the people. Historically speaking, constitutional government preceded constitutional democracy both in Turkey and in the West. Thus, while the origins of constitutional government in Turkey go back to the late nineteenth century, constitutional democracy became operative only from the mid-1940s with the transition to a true multi-party system.

A recent study on political culture and constitutionalism has concluded that the question of whether or not institutional models were borrowed from foreign sources has little relevance to the success or failure of constitutional regimes.

The phenomenon of institutional borrowing, in fact, is actually quite common and need not be debilitating or delegitimizing. Institutional models of government do not remain the property of their originat-

ing countries but become, instead, part of a broader global political culture from which all are free to take and borrow as they choose. Liberal democratic ideals of government are inherently universalistic. The real challenge is to make these borrowed institutions relevant to unique national cultures and historical experiences.⁷

Whatever the conclusions in this regard, it should be emphasized that the Turkish experience with constitution-making is essentially indigenous, which makes it even more interesting for comparative purposes. All five Turkish constitutions were, by and large, the products of indigenous effort, although borrowing could be felt in certain limited areas as will be spelled out below. Nevertheless, the constitutional revisions adopted since 1995 were strongly conditioned by Turkey's hope of accession to the European Union (EU). This external stimulus will be treated at length in Chapter 5.

Chapter 1 will provide a history of constitution-making including the adoption of the current constitution (adopted in 1982). Chapters 2 and 3 will treat the fifteen amendments to this constitution made since 1987. Chapter 4 will analyze the closely related implementing or "harmonization" laws. Chapter 5 will deal with the effects of the EU membership prospects on the democratization reforms in general and the constitution-making process in particular. Chapter 6 will analyze the current debate on the draft for an entirely new constitution prepared by the present governing party (the Justice and Development Party, JDP; the AKP in Turkish). The book will conclude with a summary of the main features of the constitution-making process in Turkey.

Notes

- ¹ Andrea Bonime-Blanc, *Spain's Transition to Democracy: The Politics of Constitution-Making* (Boulder: Westview Press, 1987), 13.
- ² Bonime-Blanc, *Spain's Transition to Democracy*, 121.
- ³ Gianfranco Pasquino, "The Demise of the First Fascist Regime and Italy's Transition to Democracy, 1943–1948," in Guillermo O'Donnell, Phillippe C. Schmitter, and Lawrence Whitehead, eds., *Transitions from Authoritarian Rule: Southern Europe* (Baltimore: Johns Hopkins University Press, 1986), 64.
- ⁴ Bonime-Blanc, *Spain's Transition to Democracy*, 143, also 54–55.
- ⁵ Bonime-Blanc, *Spain's Transition to Democracy*, 39–42, 59–62; also Jose Maria Maravall and Julian Santamaria, "Political Change in Spain and the Prospects for Democracy," in O'Donnell, Schmitter, and Whitehead, eds., *Transitions from Authoritarian Rule: Southern Europe*, 87–89.
- ⁶ Bonime-Blanc, *Spain's Transition to Democracy*, 119, 122.
- ⁷ Daniel P. Franklin and Michael J. Baun, "Conclusion," in Franklin and Baun, eds., *Political Culture and Constitutionalism: A Comparative Approach* (Armonk, New York: M.E. Sharpe, 1995), 224.

CHAPTER 1

The History of Constitution-Making in Turkey

The First Steps Toward Constitutional Government

As indicated above, the beginnings of constitutionalism in the Ottoman Empire can be traced back to the nineteenth century.¹ The first constitutional document of dubious legal value was the Deed of Alliance (*Sened-i İttifak*) signed in 1808 between the representatives of local notables (*âyan*) and those of the central government. In the document the notables affirmed their loyalty to the central government in exchange for recognition of their traditional privileges. The document also stipulated that the Chief Minister would be responsible for the state affairs. Although the interpretations comparing the Deed of Alliance with the Magna Carta are highly exaggerated, it can still be considered as the first step towards the notions of limited government and the rule of law. However, the Deed remained unimplemented, and was quickly superseded by the authoritarian modernization of Sultan Mahmud II.

The second step towards constitutional government was the two edicts of the Reform period (notably, the Edict of *Tanzimat* of 1839, and that of *Islahat* of 1856). Legally, these documents were no more than a unilateral declaration and recognition by the Sultan of certain basic human rights for his subjects, including security of life, honor and property, the abolition of tax farming (*iltizam*), fair and public trial of persons accused of crimes, and the equality of all Ottoman subjects irrespective of religion. No effective legal mechanism was established to ensure the enforcement of such provisions, which remained only morally binding upon the Sultan. Yet, one should not minimize the significance of the Reform rescripts in the constitutional development of the Ottoman Empire. They signified the first important break with the autocratic and absolutist political traditions of the Empire, and they paved the way for a still more important step, the promulgation of the first Ottoman Constitution in 1876.

The Constitution of 1876

The Ottoman Constitution of 1876, promulgated by Sultan Abdülhamit II, acting under the pressure of a small group of reformist bureaucrats, was prepared not by a representative constituent assembly, but by a special committee appointed by the Sultan. The committee was composed of a total of 28 members, including two members of the military establishment, 16 civilian bureaucrats (of whom three were Christians), and 10 religious scholars (*ulema*).² In the committee, the reformers headed by the Prime Minister Mithat Paşa were in a minority. Therefore, the final text reflected a compromise between the reformers and the conservatives supported by the Sultan.

The Constitution of 1876 provided, for the first time, some constitutional mechanisms to check the absolute powers of the Sultan. The most important novelty of the Constitution was the creation of a legislative assembly at least partially elected by the people. The Ottoman legislature, called the “General Assembly” (*Meclis-i Umu-mi*) was composed of two chambers: the Senate (*Heyet-i Ayan*) and the Chamber of Deputies (*Heyet-i Mebusan*). The members of the Senate were to be appointed for life by the Sultan, while the deputies were to be elected by the people through indirect (two-stage) elections in which only property owners were allowed to vote. The General Assembly was granted certain powers to enact laws and to exercise control over the executive. On both accounts, however, the ultimate authority still rested with the Sultan, who thus remained the cornerstone of the constitutional system. On the other hand, the Sultan could not unilaterally enact laws or amend the Constitution. Thus, some degree of balance was established between the two political organs. In addition, the Constitution had recognized the independence of the judiciary and enumerated certain basic rights and freedoms.

The Constitution of 1876 fell far short of establishing a parliamentary monarchy, in which the substance of political power rested with parliament, and the monarch’s role is restricted essentially to ceremonial and symbolic matters. Nevertheless, even this limited experience in constitutional government proved too much for Abdülhamid II, who prorogued the Chamber of Deputies indefinitely in 1878 and returned to absolutist rule for thirty years. The influence of Western liberalism, however, continued and expanded under his

authoritarian rule. Increasing numbers of students, intellectuals, bureaucrats and army officers joined the opposition commonly named the “Young Turks.” Eventually, the rebellion of some military units in Macedonia forced the Sultan to restore the Constitution in 1908.

The November–December 1908 elections for the Chamber of Deputies gave the Young Turks, organized under the name of Society of Union and Progress, a clear majority in the Chamber. It was this Parliament that substantially amended the Constitution after the suppression of the reactionary uprising of 13 April 1909 and the dethronement of Abdülhamit II. The amendments substantially enlarged the powers of the legislature and restricted those of the Sultan. Thus, the political accountability of the Council of Ministers before the Chamber of Deputies was explicitly stipulated, and the Sultan’s absolute veto power over the legislation enacted by Parliament was transformed into a relative veto power which could be overridden by a two-thirds majority. The Sultan’s power to dissolve the Chamber of Deputies was restricted and made subject to the approval of the Senate. Furthermore, some new public liberties, such as the freedom of assembly and association, secrecy of communications, etc., were introduced into the Constitution. Thus, a constitutional system finally came into being, more or less similar to the parliamentary monarchies of Western Europe. However, this liberal era, called the “Second Constitutionalist Period,” did not last long and was quickly transformed into the dictatorship of the dominant Union and Progress Party. With the defeat of the Ottoman Empire in World War I, the Ottoman government collapsed, in fact, if not in theory, while the İstanbul government maintained a shaky existence during the Armistice years (1918–1922) under the control of the occupying armies of the Allies. A new governmental structure was developed in Anatolia by the nationalists resisting the occupation.

The Constitution of 1921

This era of “National Liberation” is a most interesting period in Turkey’s constitutional history and is full of constitutional innovations. Following the arrest and deportation by the Allied occupation forces of many deputies with nationalist sympathies and the consequent prorogation of the chamber of Deputies in Istanbul on 18 March 1920, Mustafa Kemal (later, Atatürk; at the time the leader of

the nationalist resistance forces in Anatolia) called for the election of a new assembly “with extraordinary powers” to convene in Ankara. This body, called the Grand National Assembly of Turkey (GNAT), was different from the Ottoman Parliament in that it held both legislative and executive powers. It was, in a real sense, a constituent and revolutionary assembly, not bound by the Ottoman Constitution.

The Grand National Assembly enacted a constitution in 1921.³ This was a short (it contained only 23 articles) but very important document. For the first time, it proclaimed the principle of national sovereignty calling itself the “only and true representative of the nation.” Legislative and executive powers were vested in the Assembly, as they had been since the opening of the Assembly on 23 April 1920. Thus, the constitutional system was a textbook example of the assembly government model, where the Assembly could instruct or change the ministers at will, while the Council of Ministers had no power to dissolve the Assembly. The Constitution did not create an office of presidency for the fear that this would put an end to the alliance between the republicans and the monarchists. This was, undoubtedly, a republican form of government, since neither the principle of national sovereignty nor an all-powerful Assembly could, in fact, be reconciled with a monarchical system. However, for tactical political reasons, the Assembly did not officially abolish the sultanate until after the final victory over the invading Greek armies. The sultanate was abolished on 30 October 1922, and the Republic was officially proclaimed about a year later, on 29 October 1923.

The Constitution of 1924

The Turkish Republic clearly needed a new constitution. The Constitution of 1921 was not meant to be a constitution in the full sense of the word; rather, it was a short document dealing only with the most urgent constitutional problems of the moment. The new Constitution was adopted by the Grand National Assembly elected in 1923. The Assembly was not a constituent assembly, but an ordinary legislature. However, it adopted a quorum of two-thirds majority for its constitutional votes. The 1923 elections were strongly controlled and dominated by the RPP, newly organized by Mustafa Kemal and his supporters. None of the deputies who had opposed Kemal during the first legislative session of the Assembly (1920–1923) had been re-

elected. Thus, the new legislature was almost completely dominated by Kemalists, although a single-party system had not yet been consolidated when it debated the new Constitution. Therefore, the constitutional debates took place in an atmosphere of relative freedom, even though the Assembly by no means represented all of the major forces in society.

The Constitution of 1924 retained many of the basic principles of the 1921 Constitution, notably the principle of national sovereignty. The Grand National Assembly was considered, as it was under the 1921 Constitution, “the sole representative of the nation, on whose behalf it exercises the rights of sovereignty” (Art. 4). Theoretically, both legislative and executive powers were concentrated in the Assembly (Art. 5), but the Assembly was to exercise its executive authority through the President of the Republic elected by it and a Council of Ministers appointed by the President (Art. 7). The Assembly could at any time supervise and dismiss the Council of Ministers, while the Council had no power to dissolve the assembly to hold new elections.

In classical constitutional theory, this was an “assembly government” based on the unity or concentration of the legislative and executive powers, rather than a parliamentary government where such powers are, to some extent, separated from each other. In practice, however, the theoretical supremacy of the assembly is often transformed into the domination of the executive body, since normally the executive is composed of party or faction leaders, while the legislature includes a numerically larger, but politically much weaker, group of backbenchers. This was also the case in Turkey. Both in the single-party (1925–1946) and multi-party (1946–1960) years, the authoritarian leadership of the chief executives and strong party discipline reduced the Assembly to a clearly secondary role.

In the Assembly debates on the Constitution, most deputies were intent on jealously preserving the dominant position of the Assembly. It is highly interesting that even at the height of Atatürk’s prestige, the Assembly rejected a proposal to give the President of the Republic the power to dissolve the Assembly. Reşat Bey’s (the deputy from Saruhan) words in this regard reflect the mood of the Assembly: “Supposing that God is the President of the Republic and the Angels are the Ministers, we cannot grant the power of dissolution.”⁴ Other points of controversy concerned the term of the presidency, the presi-

dent's veto power over legislation, and the position of the commander-in-chief. On all three issues, the proposals of the Constitutional Committee were modified or rejected in favor of the Assembly.

The Constitutional Committee had foreseen a seven-year term for the president and a four-year term for the Assembly; the Assembly adopted a four-year term for both, with the possibility of re-election for the president. The Constitutional Committee had proposed a presidential veto over the laws adopted by the Assembly which could be overridden only by a two-thirds majority; the Assembly modified it into a simple request for a reconsideration of the bill which could be overridden by an ordinary majority. Finally, the Committee had proposed that the president should be the commander-in-chief of the armed forces, which most deputies considered a direct assault on the principle of national sovereignty. At the end, the article ultimately adopted stated that "the supreme command of the armed forces is vested in the Grand National Assembly and is represented by the President of the Republic. In time of peace the command of all armed forces is entrusted by special law to the Chief of the General Staff, and in time of war is given to the person appointed by the President of the Republic upon the proposal of the Council of Ministers."⁵

The Constitution of 1924 was undoubtedly a democratic constitution in spirit. It gave no hint of the emerging authoritarian single-party system. However, this was a "majoritarian" or "Rousseauist" conception of democracy, rather than a liberal or pluralistic democracy based on an intricate system of checks and balances. The majoritarian concept of democracy holds that sovereignty is the "general will" of the nation (which, in practice, has to be interpreted as the majority's will), and it is, as such, absolute, indivisible and infallible. Within a representative system, this means that the legislature represents the true will of the nation. Hence, limiting the powers of the legislature would be tantamount to restricting the national will, which would, in turn, limit the sovereignty of the nation. Furthermore, such limitations would be neither necessary nor useful, since under the Rousseauist concept of democracy the general will is always right.

Needless to say, modern democratic theory no longer depends on such metaphysical concepts as the general will. Nevertheless, Rousseauist ideas had a lasting impact on French democratic thought, through which they influenced the thinking of the Turkish revolutionaries. Nor should one lose sight of the fact that the Constitution of 1924

was the culmination of a long struggle against the sultans. It is not surprising, therefore, that the only perceived threat to national interests was that which could come from the sultans; once this threat was removed, the revolutionaries thought, there would be no need to protect the nation against its own true representatives. Evidently, the framers of the Constitution of 1924 were not sufficiently aware that the tyranny of a majority was just as possible, and as dangerous, as a personal tyranny.

This rather simplistic view of democracy was present in many aspects of the Constitution: its creation of an all-powerful Assembly; its somewhat emotional distrust of the executive; its insufficient safeguards for the independence of the judiciary; and its failure to institute formal restraints on the legislative power, notably the lack of a judicial mechanism for reviewing the constitutionality of laws. Although the Constitution declared and enumerated the basic rights of Turkish citizens, it often stated that such rights would be enjoyed only "within the limits stipulated by law." Hence, the Assembly was constitutionally empowered to restrict basic rights, almost at will.

Lack of constitutional checks and balances did not pose a major problem during the single-party years (1925–1946), since a single-party system itself implies a heavy concentration of governmental authority. Furthermore, it can reasonably be argued that the modernizing reforms of the Kemalist era could hardly have been carried out by a political system in which such authority was divided and dispersed. But, with the transition to a multi-party system in 1946, the problems of the Constitution became obvious. The unrestrained nature of the legislative power, coupled with an electoral system which produced lopsided majorities in the legislature, made it tempting for the leaders of the majority party to use their vast powers to suppress, or at least harass, the opposition. Thus, in the late 1950s, tension increased greatly between the governing Democrats and the opposition Republicans. Some overly authoritarian measures taken by the government in the spring of 1960 created widespread unrest in the country. Finally, on 27 May 1960, units of the Turkish armed forces overthrew the Menderes government.

The Constitution of 1961

The military committee (the National Unity Committee, NUC) that took over power was intent on a return to civilian rule, once a new and democratic constitution was adopted. At first, the Committee charged a group of law professors with the preparation of a constitutional draft. The Commission under the chairmanship of Professor Sıddık Sami Onar of İstanbul University produced, after many months of hard work, a curious draft with many dissenting opinions. The draft seriously deviated from the principle of universal suffrage by proposing to create a second chamber (Senate of the Republic) which would be partly cooptative and partly elected by voters with at least a middle school education. The draft also proposed to establish a large number of autonomous administrative agencies, thus severely restricting the powers of the executive.⁶ As the draft was received with a great deal of doubt and disappointment by the general public, the National Unity Committee decided to convene a Constituent Assembly to prepare the new constitution. A law (No.157) adopted by the NUC on 13 December 1960 established a bicameral Constituent Assembly, of which one chamber was the NUC itself. Nor was the other chamber (House of Representatives) directly elected. At that time, political circumstances were not considered suitable for convening an elected Constituent Assembly. The Democrat Party (DP) was dissolved by a court order and no new parties had yet been formed to organize its former supporters.

Thus, the NUC decided to establish a partly indirectly elected and partly cooptative House of Representatives. Under Laws No.157 and 158, the House of Representatives was composed of the following members: (1) ten members selected by the Head of the State (General Cemal Gürsel); (2) eighteen members selected by the NUC; (3) members of the Council of Ministers; (4) 75 members indirectly elected from provinces in which only one delegate from each village, neighborhood headmen and primary school headmasters in sub-province centers, members of the executive committees of professional organizations, and members of the executive committees of political parties had the right to vote; (5) representatives of the two existing political parties, the RPP, and the Republican Peasant Nation Party (RPNP); the former was given 49, and the latter 25 seats; (6) 79 members chosen by professional organizations and certain associations (bar associa-

tions, representatives of the press, veteran associations, artisans' and traders' associations, youth representatives, trade unions, chambers of commerce and industry, teachers' associations, agricultural organizations, representatives of universities and the judiciary).⁷

This mode of selection understandably gave the RPP an almost complete domination over the House of Representatives, in which the overthrown DP supporters were not represented at all. To make this even more certain, Article 2 of Law No. 157 had excluded all those who had supported "the unconstitutional and anti-human rights policies by their activities, publications, and behavior until the Revolution of 27 May" from membership in the House of Representatives. Consequently, the Constitutional draft prepared by the House closely conformed to the constitutional theses of the RPP. Over its years as the opposition, between 1950 and 1960, the RPP, troubled by the illiberal majoritarian policies of the DP government, had developed a preference for a more liberal and pluralistic democracy based on a system of checks and balances, including constitutional review and strong guarantees for the independence of the judiciary. The demand for the establishment of a constitutional court was expressed in the 1957 election platform of the RPP and its Declaration of First Objectives issued on 14 January 1959.⁸

The strong RPP majority in the House of Representatives had no difficulty in translating these objectives into the Constitution. Provisions concerning the Constitutional Court, a second chamber (Senate of the Republic), independence of the judiciary, and more effective guarantees for the fundamental rights and liberties were adopted without much debate, although there were differences of opinion about their modalities. The Constituent Assembly, also entrusted with the task of preparing new electoral laws, opted for a proportional representation system for the National Assembly and a majoritarian system for the Senate of the Republic. More controversial points concerned the principles of nationalism and social state. On both accounts, there were significant differences of opinion between the more conservative and the more liberal-leftist wings of the RPP. In the draft prepared by the Constitutional Committee of the House, Article 2 on the characteristics of the Republic read that "the Republic of Turkey is democratic and secular; it is based on human rights and liberties, work and social justice." The more conservative members objected to this formulation on the grounds that reference to

work and social justice could be suggestive of a socialist state. Finally, an agreement was reached on the term "social state." The principle of nationalism gave rise to a more heated controversy. Many members were in favor of preserving the word "nationalist" as it existed in the 1924 Constitution. Faced with these criticisms, the Constitutional Committee proposed a compromise solution of inserting the term "national state" rather than nationalist. The Committee's proposal was adopted by 103 votes against 65. The NUC, in its turn, also favored the insertion of the term "nationalist," but it was rejected by a close vote (108 against 84 with 12 abstentions) by the House of Representatives. The final text of Article 2 read as follows: "The Republic of Turkey is a national, democratic, secular, and social state governed by the rule of law and based on human rights and the fundamental principles stated in the Preamble."⁹

The Constituent Assembly was dominated largely by the state elites (the military, the bureaucracy, and university professors) and the RPP, the principal spokesperson of those elites. Consequently, the 1961 Constitution, adopted by the Assembly and ratified by a majority (61.7%) of the popular vote on 9 July 1961 reflected the basic political values and interests of the state elites. Thus, on the one hand, the Constitution greatly expanded civil liberties and granted extensive social rights for citizens; on the other hand, it reflected a distrust of politicians and elective assemblies by creating an effective system of checks and balances to limit the power of those elected organs. These checks included the introduction of judicial review of the constitutionality of laws; strengthening the administrative courts, with review powers over all executive agencies; full independence for the judiciary; creation of a second chamber of the legislative Assembly; improved job security for civil servants, especially judges; and granting substantial administrative autonomy to certain public agencies, such as the universities and the Radio and Television Corporation. It was hoped that the power of the elected assemblies would be effectively balanced by judicial and other bureaucratic agencies and that the newly expanded civil liberties and social rights would ensure the gradual development of a genuinely pluralistic and democratic society.

With regard to the regulation of socioeconomic issues, the majority in the Constituent Assembly interpreted the old Kemalist notion of *etatism* in a more leftist and ideological way. Consequently, many

programmatic and ideological statements were incorporated into the constitution. Thus, the state was entrusted with economic, social, and cultural planning; land reform; health care and housing; social security organizations; helping to assure full employment; and similar tasks. The state was also empowered to force private enterprises to act “in accordance with the requirements of national economy and with social objectives” (Article 40).

Neither the circumstances of its creation nor its substance allowed the 1961 Constitution to be accepted by a large majority of Turkish society. Former Democrats, in part because they had been totally excluded from the constitution-making process, voted against it in the constitutional referendum on 9 July 1961. The Justice Party (JP), which came to power in 1965 as the established heir of the banned DP, was ambivalent toward the constitution. The JP was careful to operate within the limits of the Constitution, but criticized those aspects that, in its view, gave bureaucratic and judicial agencies excessive powers. JP leaders often expressed the view that the Constitution created an “ungovernable” political system, and they demanded a stronger executive. They were uncomfortable with the extensive social rights recognized by the constitution, as well as its other left-leaning provisions.

The views of Celal Bayar, deposed president of the Republic under the DP regime, were both more systematic and extreme than those of the JP. Bayar argued that the 1924 Constitution was more in accordance with the Kemalist notion of unconditional sovereignty because it concentrated all power in the Grand National Assembly as the sole representative of the Turkish nation. The 1961 Constitution introduced new partners—the army and intellectuals—into the forum of national sovereignty. Thus, it reflected a distrust of elected assemblies and represented a return to the Ottoman notion of a tripartite (palace, army and religious scholars) government.¹⁰ No doubt, such negative views of the 1961 Constitution were also motivated in part by the fact that the DP–JP had been the “natural” majority party in the 1950s and 1960s and was therefore resentful of bureaucratic limitations on the power of elected assemblies.

The 1971 and 1973 Constitutional Revisions

The tension between state elites and the JP as the principal representative of political elites tended to decrease in the late 1960s. The JP government treated the military with much greater care and respect than the DP government had. The National Security Council (NSC), an advisory body created by the 1961 Constitution and composed of some ministers and the highest commanders of the armed forces, gave the military a legitimate voice in the formulation of national security policies. The Grand National Assembly's choice of former military commanders as president of the Republic (General Gürsel in 1961 and General Cevdet Sunay in 1966) also reassured most officers. Finally, salaries and other benefits for officers improved greatly in the 1960s.

Although a strong radical faction within the armed forces was still unhappy with the JP government and its basically conservative policies, that group's conspiratorial activities failed to gain the support of the top military leadership. The radical officers, frustrated by the successive JP electoral victories, aimed to establish a longer-term military regime to carry out radical social reforms; in fact, the military memorandum of 12 March 1971 that forced the JP government to resign was a last-minute move by top military commanders to forestall a radical coup. In the days following, most radical officers were summarily retired or dismissed, thereby strengthening the position of the more conservative military leaders. The so-called 12 March regime did not go as far as dissolving the parliament and assuming power directly. Instead, it urged the formation of an above-party, or technocratic, government under veteran RPP politician Nihat Erim.

The policies of the non-party government, with strong behind-the-scenes support from the military, were more in line with the JP's conservative philosophy. This fact is also evident in the extensive 1971 and 1973 constitutional amendments, which incorporated most of the JP's positions into the constitution. The amendments can be grouped into three categories: (1) curtailing certain civil liberties in conjunction with restrictions of the review power of the courts; (2) strengthening the executive, particularly by allowing the legislature to grant it law-making powers; and (3) increasing the institutional autonomy of the military by excluding it from review by civilian administrative courts and the Court of Account.

With the possible exception of the last item, the amendments were in accordance with the JP's constitutional thesis, and JP and other conservative deputies readily voted in favor. To obtain the two-thirds majority required for constitutional change, pressure was apparently exerted on the RPP leadership and its deputies. The threat of dissolution of the parliament, expressed clearly in the 12 March memorandum, and the highly repressive atmosphere produced by a regime of martial-law also weakened and discouraged the opposition.¹¹ Thus, once again constitutional change was accomplished by highly dissentious methods, with no process of genuine negotiation and compromise among political parties. One side imposed its favored solutions on the other, taking advantage of the threat of force by the military.

The 1982 Constitution

The making of the 1982 Constitution was another missed opportunity to create political institutions with broad consensus. Although the NSC (composed of the five highest-ranking generals in the Turkish armed forces) that took over the government on 12 September 1980 made it clear that it intended eventually to return power to democratically elected civilian authorities, it made it equally clear that it did not intend to return to the *status quo*. Rather, the Council intended a major restructuring of Turkish democracy to prevent a recurrence of the political polarization, violence, and deadlock that had afflicted the country in the late 1970s.

This restructuring was done by a Constituent Assembly created by the NSC. As in the case of the 1960–1961 Constituent Assembly, the structure was bicameral, one chamber of which was the NSC itself. However, important differences were found between this Constituent Assembly and its predecessor. In the present case, the civilian chamber (the Consultative Assembly) was even less representative than the House of Representatives of the 1960–1961 period. Whereas the latter included representatives of the two opposition parties and various other institutions, all members of the former were appointed by the NSC. Furthermore, no political party members were eligible to become members of the Consultative Assembly. Consequently, the state elites had even more weight in the Consultative Assembly than they had in the House of Representatives.

Second, the Consultative Assembly had much less power *vis-à-vis* the NSC than the House of Representatives had enjoyed *vis-à-vis* the NUC. In the latter case, the two chambers had roughly equal powers regarding the adoption of the constitution and other laws; in the former, the NSC kept the final say. In other words, the NSC had the absolute power to amend or reject the constitutional draft prepared by the Consultative Assembly, with no machinery envisaged to resolve the differences between the two chambers.

Third, whereas the 1961 constitutional referendum took place in a reasonably free atmosphere and those who opposed the constitution (particularly the JP) were able to make public their views, the 1982 referendum followed a one-sided campaign conducted by General Kenan Evren, the head of state and chair of the NSC. A NSC decree prohibited the expression of any views intended to influence voters' decisions and banned criticism of the transitional articles of the constitution or of speeches Evren made in his pro-constitution campaign.

Finally, the 1982 constitutional referendum was combined with the election of the president of the Republic. A "yes" vote for the Constitution was also an endorsement of the presidency of Evren (the sole candidate) for a seven-year period. Furthermore, the NSC members implied that in case of a rejection of the draft, the NSC regime would continue indefinitely. Under these circumstances, the Constitution was approved on 7 November 1982 by 91.37 percent of voters in a referendum of highly dubious democratic legitimacy.

The 1982 Constitution—again reflecting the values and interests of state elites—was even less trusting than its predecessor of the "national will," elected assemblies, political parties, politicians, and all other civil society institutions such as trade unions, professional organizations, and voluntary associations. Trade unions were weakened, and the freedom of association was severely restricted. No cooperation was allowed between political parties on the one hand and unions, professional organizations, foundations, associations, and cooperative societies on the other. If the 1982 Constitution somewhat curbed the review powers of the judiciary and the autonomy of universities, this was not intended to strengthen elected assemblies and responsible governments at the expense of bureaucratic agencies. Rather, the intent was to create a strong presidency, which the makers of the 1982 Constitution (almost all of whom were military officers and civilian bureaucrats) assumed would be controlled by the

military. Indeed, Kenan Evren, the leader of the 1980 coup, served as president until November 1989.

A major difference between the making of the 1961 and 1982 Constitutions is that in the latter case the military no longer trusted civilian bureaucratic agencies, which it perceived as highly fragmented, infiltrated by political parties, and vulnerable to radical political ideas. Therefore, the President of the Republic was given important substantive powers in appointing high-court judges and university administrators, the two areas the military considered particularly sensitive. In short, the 1982 Constitution was designed to maintain the military as the ultimate guardian and arbiter of the political system through a strengthened presidency and the NSC.

This emphasis on strengthening the presidency led to different interpretations of the system of government created by the 1982 Constitution. Some observers perceived it as a presidential or semi-presidential system. Another view held that the Constitution provided two alternative models of government. If the system functioned normally (i.e., without a crisis) it would be closer to a parliamentary government in which the prime minister, not the President of the Republic, would predominate; this is precisely what happened under the premiership of Turgut Özal (1983–1989). If, on the other hand, the party system failed to avoid or resolve crises, then “the substitute power” of the president (or of the state apparatus as personified by the president) would grow, and the system would become closer to presidential.¹² According to a third view, the logic of the 1982 Constitution dictated a parliamentary system, even though the president was more powerful than most heads of state in parliamentary systems. Therefore, the system could be called, borrowing a French term, “parlementarism atténué” or weakened parliamentarianism.¹³

The history of constitution-making in Turkey described here suggests that none of the three republican constitutions was made by a broadly representative Constituent Assembly through a process of negotiations, bargaining, and compromise. In all three cases, as well as in the extensive constitutional revisions in 1971 and 1973, the influence of state elites was predominant in constitution-making, and the role of civil society institutions was correspondingly limited. Therefore, all three Constitutions had weak political legitimacy, and judging by the frequency of military interventions in politics, none produced a fully consolidated democratic regime.

It is generally argued that the basic philosophy of the 1982 Constitution was to protect the state and its authority against its citizens rather than protecting individuals against the encroachments of the state authority. This can be most clearly seen in the original Preamble of the Constitution that refers to the Turkish State as “sublime” (*yüce*) and “sacred” (*kutsal*) (both adjectives were deleted in the 1995 constitutional amendment). This statist philosophy can also be observed in articles on fundamental rights and liberties. Even though the Constitution recognized most of the fundamental rights and liberties commonly found in liberal democratic constitutions, it regulated them in such a manner that restrictions became the rule rather than the exception. Such rights and liberties could be restricted in a cumulative way both by Article 13 that stipulated the general grounds for restriction applicable to all rights and liberties and the specific grounds in their related articles.

A second general feature of the Constitution was its tutelary character. As was pointed out above, the military founders had very little trust in civilian political elites and the elected branches of government. Therefore, the Constitution established a number of tutelary institutions designed to check the powers of the elected agencies and to narrow down the space for civilian politics. Foremost among such institutions was the Presidency of the Republic alluded to above. Another one was the strengthened National Security Council. The original text of the Constitution gave the military members a majority in the Council and stipulated that the decisions of the Council should be given priority consideration by the Council of Ministers, thereby, rendering such decisions binding if not in theory, at least in practice. A third tutelary institution was the Council of Higher Education (YÖK) that was designed to put universities in order and under strict discipline. The President of the Republic was given the power to appoint the president and some members of the YÖK and the university rectors. Finally, the President of the Republic was given broad discretionary powers with regard to the judiciary, such as appointing the judges of the Constitutional Court (three of them directly, and eight of them from among candidates nominated by the other high courts and the YÖK), one-fourth of the members of the Council of State (the highest administrative court), the members of the Supreme Council of Judges and Public Prosecutors (from among three candidates nominated by high courts) and the Chief Public Pros-

ecutor of the Court of Cassation (Yargıtay) and his deputy from among five candidates nominated by the Court of Cassation. Thus, the judiciary was conceived of as another tutelary institution designed to protect the values of the state elites against the actions of elected governments.

Finally, the military obtained important powers, privileges and immunities as a price for relinquishing power to elected civilian institutions (exit guaranties as they are commonly called). In addition to the National Security Council mentioned above, the military was exempted from the review of the Court of Accounts (*Sayıştay*), the High Board of Supervision (*Yüksek Denetleme Kurulu*), and the decisions of the Supreme Military Council (*Yüksek Askerî Şûra*) regarding high-level military appointments, promotions, and expulsions from the military were closed to judicial review. The laws and law-amending ordinances (decrees) passed by the National Security Council regime (1980–1983) were exempted from the review of constitutionality by the Constitutional Court. Furthermore, the Law on the General Secretariat of the National Security Council provided that the Secretary General shall be a high-level military person and endowed the Secretariat with broad executive powers.¹⁴

It is no wonder that the 1982 Constitution met with severe criticisms almost from its inception. In the following years, most political parties and the leading civil society institutions such as the Union of Turkish Bar Association (TBB), the Union of Chambers and Commodity Exchanges of Turkey (TOBB), and the Association of Turkish Businessmen and Industrialists (TÜSİAD) proposed entirely new constitutional drafts or at least radical changes in the Constitution.¹⁵ Consequently, starting from 1987, the Constitution has undergone 15 amendments.¹⁶ The general direction of these amendments was to improve liberal-democratic standards, although some of them dealt with rather trivial matters, as will be explained in the following chapters. Despite these positive changes, it is generally agreed that it was not possible to completely liquidate the illiberal and tutelary spirit of the 1982 Constitution. In the summer of 2007 constitutional debates took a new turn when the governing JDP initiated a process for the making of an entirely new constitution. This process will be analyzed in depth in Chapter 6.

Looked at from a broader political perspective, Turkish constitutionalism faces three major challenges in the foreseeable future,

namely the rise of political Islam and of Kurdish nationalism, and the continuing influence of the military over civilian politics.¹⁷ The rise of political Islam reached the proportions of a major challenge in the mid-1990s when the Islamist Welfare Party (WP) emerged from the 1995 parliamentary elections as the largest party with 21.4 percent of the vote. The policies of the coalition government between the WP and the center-right True Path Party (TPP) soon led to an extreme polarization in the country and serious frictions with the strongly secularist military establishment. The crisis came to an end by the so-called “28 February Process,” during which the military, supported by the opposition parties and major civil society organizations, resorted to not-so-subtle means to force the WP–TPP government to resign. Shortly thereafter, the WP was closed down by the Constitutional Court on account of its anti-secularist activities. Its successor, the Virtue Party (VP), met the same fate. Although the WP prudently refrained from challenging the basic premises of democracy and maintained that elections were the only route to political power, it was difficult to reconcile its Islamist discourse and its apparent desire to gradually Islamize the society with the strong secularist commitment of the state establishment and of the current Constitution.

The JDP formed after the closure of the VP took a much more moderate course compared to its predecessors. The JDP’s statute and program endorse secularism and contain no hint of an Islamist agenda. Although respectful of religious beliefs and practices, it strongly rejects the use of state power in order to transform (i.e., to Islamize) the society. It refuses to be called a “Muslim democratic” party and prefers instead the label of “conservative democrat.” Both the policies of the JDP government between November 2002 and now, and the analysis of its voters base in the 2002 and 2007 parliamentary elections suggest that the JDP is closer to the dominant center-right tradition in Turkey (represented in the past by the DP, JP, Motherland Party and TPP) than to the predecessor Islamist parties (WP and VP).¹⁸ It remains a fact, however, that a certain section of the Turkish public is highly suspicious of the JDP and believes that it has a hidden agenda to transform Turkey into a *sharia*-based Islamic state. Thus, as a recent public opinion survey shows, while only 8.9 percent of the population are in favor of a *sharia*-based government, 22.1 percent think that secularism is in danger and a majority (50.2%) even believe that the JDP intends to introduce an Islamic way of life (not

to be confused with a *sharia*-based government). To make things even more complicated, those who think that secularism is under threat belong disproportionally to the wealthier and better educated segments of the society.¹⁹ Thus, it appears that Turkish society is highly polarized over the secular–religious cleavage. Under such circumstances it seems difficult to introduce even minor constitutional amendments concerning the relationship between the state and religion. Such attempts will be immediately branded by the secularist camp as a betrayal of Atatürk’s secularist legacy.²⁰

A second, even more serious, challenge is posed by the rise of Kurdish nationalism. Kurds represent the only large linguistic minority group in Turkey (an estimated 10–15 percent of the population).²¹ Although Kurdish speakers constitute a majority in many eastern and southeastern provinces, a large part of them live in other regions of the country and are fairly well integrated into Turkish society. Since the late 1970s a separatist terrorist organization, the Kurdish Workers’ Party (PKK) has emerged in the southeastern region. The PKK, however, has the support of only a minority of Kurds even in that region. This is most clearly observed in the 2007 elections when the JDP emerged as the largest party in eastern and southeastern regions.

Kurdish demands vary between relatively modest ones such as the recognition of their separate cultural identity and the cultural rights associated with it, to the other extreme of regional autonomy, federation, and even secession from Turkey. Since the late 1980s, Kurdish nationalism has been represented by a number of successive ethnic parties, each of which was closed down by the Constitutional Court on account of activities against the territorial and national integrity of the country. At the moment, this trend is represented in the parliament by the Democratic Society Party (DSP), which also faces a prohibition case before the Constitutional Court. To meet the maximalist demands of the PKK and of the Kurdish nationalist parties (with barely hidden sympathy for that organization) is altogether impossible within the present constitutional structure of Turkey, and it is most unlikely that they will ever be met in the future. The question is whether more modest constitutional reforms such as more extensive cultural rights and greater administrative decentralization will satisfy a majority of Kurdish speakers and thus politically isolate the more extremist elements. The constitutional issues raised by the challenges

of political Islam and Kurdish nationalism will be analyzed in greater depth in Chapter 6.

The third obstacle to democratic consolidation is the continuing influence of the military over civilian politics. The constitutional amendments of 2001 and the following reforms have eliminated some of their constitutional privileges, as will be spelled out below. These reforms do not reflect, however, a parallel decrease in the *de facto* political weight of the military. The significant role of the military in Turkish politics is due partly to historico-political factors, and partly to the two challenges discussed above. As regards the former, the military played a very significant role in the founding of the Republic and have since then been the staunchest defenders of the Kemalist legacy, most importantly his principles of a united, secular, nation-state. This historical role gave the military a strong sense of mission of protecting the Kemalist principles and the national interest against, if necessary, “unprincipled, corrupt, power-hungry, and particularistic politicians.” This sense of mission led the military to three interventions (1960, 1971, and 1980; four, if we count the 28 February 1997 process as a military intervention) in the last 47 years, and on each of those occasions they obtained new constitutional privileges and immunities and increased their political influence. With regard to the latter factor, it can be argued that the military’s continuing political influence is closely related to the two challenges mentioned above. Clearly, the demands both of political Islamists and of Kurdish nationalists run counter to their cherished values of a united, secular nation-state; and, unless these two challenges somehow subside, the tutelary role of the military is likely to continue. Constitutional and legal reforms concerning civil-military relations will be discussed in the following chapters.

Notes

- ¹ On the Ottoman constitutional developments, see especially: Bülent Tanör, *Osmanlı-Türk Anayasal Gelişmeleri (1789–1980)* [Ottoman-Turkish constitutional developments (1789–1980)] (Istanbul: Afa Yayınları, 3rd edition, 1996); Recai G. Okandan, *Amme Hukukumuzun Ana Hatları* [Outlines of our public law] (Istanbul: Fakülteler Matbaası, 1957); Robert Devereux, *The First Ottoman Constitutional Period: A Study of the Midhat Constitution and Parliament* (Baltimore: The Johns Hopkins Press, 1963); Stanford J. Shaw and Ezel Kural Shaw, *Reform, Revolution, and Republic: The Rise of Modern Turkey, 1808–1975, Vol. 2, History of the Ottoman Empire and Modern Turkey* (Cambridge: Cambridge University Press, 1985); Bernard Lewis, *The Emergence of Modern Turkey* (London: Oxford University Press, 1968); Roderic H. Davison, *Reform in the Ottoman Empire, 1856–1876* (Princeton, NJ: Princeton University Press, 1963).
- ² Tanör, *Osmanlı-Türk Anayasal Gelişmeleri*, 101; Devereux, *The First Ottoman Constitutional Period*, 47–48.
- ³ Ergun Özbudun, *1921 Anayasası* [The Constitution of 1921] (Ankara: Atatürk Araştırma Merkezi, 1992).
- ⁴ A. Şeref Gözübüyük and Zekai Sezgin, *1924 Anayasası Hakkındaki Meclis Görüşmeleri* [Assembly debates on the Constitution of 1924] (Ankara: Üniversitesi Siyasal Bilgiler Fakültesi İdari İlimler Enstitüsü, 1957), 188.
- ⁵ Gözübüyük and Sezgin, *1924 Anayasası Hakkındaki Meclis Görüşmeleri*, *passim*; Edward Smith, “debates on the Turkish Constitution of 1924,” *Ankara Üniversitesi Siyasal Bilgiler Fakültesi Dergisi*, Vol. 13, No. 3 (September 1958), 82–105.
- ⁶ For the text of the draft and the dissenting opinions, see: Kazım Öztürk, *Türkiye Cumhuriyeti Anayasası* [The Constitution of the Republic of Turkey] (Ankara: Türkiye İş Bankası Kültür Yayınları, 1966), Vol.1, 23–338.
- ⁷ For the text of Law No.157, see: Öztürk, *Türkiye Cumhuriyeti Anayasası*, Vol.1, 4–19; see also: İlhan Arsel, *Türk Anayasa Hukukunun Umumi Esasları* [General principles of Turkish Constitutional Law] (Ankara: Mars, 1965), 122–32. See also: Ömer Faruk Gençkaya, “Türk Siyasal Sisteminde Kurucu Meclis: 1961 ve 1981 Deneyimlerinin Karşılaştırılması” [Constituent Assembly in the Turkish political system: Comparison of 1961 and 1981 experiences], in Suna Kili, ed., *27 Mayıs 1960 Devrimi, Kurucu Meclis ve 1961 Anayasası* [27 May 1960 Revolution, the Constituent Assembly and 1961 Constitution] (Istanbul: Boyut Kitapları, 1998), 15–32.
- ⁸ Erdal Onar, *Kanunların Anayasaya Uygunluğunun Siyasal ve Yargısal Denetimi ve Yargısal Denetim Alanında Ülkemizde Öncüler* [Political and judicial control of the constitutionality of laws and the precursors of judicial review in our country] (Ankara, 2003), 199–201.
- ⁹ Öztürk, *Türkiye Cumhuriyeti Anayasası*, Vol. 2, 953–1116.

- ¹⁰ Quoted by Bülent Tanör, *İki Anayasa: 1961 ve 1982* [The Two Constitutions: 1961 and 1982] (Istanbul: Beta, 1986), 29–37, 61–67.
- ¹¹ Tanör, *İki Anayasa*, 39–60.
- ¹² Bakır Çağlar, “Anayasa Mahkemesi Kararlarında Demokrasi” [Democracy in Constitutional Court decisions], in *Anayasa Yargısı*, Vol. 7 (Ankara: Anayasa Mahkemesi Yayınları, 1990), 103–10.
- ¹³ Ergun Özbudun, *Türk Anayasa Hukuku* [Turkish constitutional law] (Ankara, Yetkin Yayınları, 2004), 337–38.
- ¹⁴ On the basic features of the 1982 Constitution, see: Ergun Özbudun, *Türk Anayasa Hukuku*; Ergun Özbudun, “Constitutional Law,” in Tuğrul Ansay and Don Wallace, Jr., eds., *Introduction to Turkish Law*, fifth edition (The Hague: Kluwer Law International, 2005), 19–46; Kemal Gözler, *Türk Anayasa Hukuku* [Turkish constitutional law] (Bursa: Ekin Kitabevi Yayınları, 2000); and Bülent Tanör and Necmi Yüzbaşıoğlu, *1982 Anayasasına Göre Türk Anayasa Hukuku* [Turkish constitutional law according to the 1982 Constitution] third edition (Istanbul: Yapı Kredi Yayınları, 2003); on civil-military relations under the 1982 Constitution with emphasis on exit guarantees, see: Serap Yazıcı, *Türkiye’de Askerî Müdahalelerin Anayasal Etkileri* [Constitutional effects of military interventions in Turkey] (Ankara: Yetkin Yayınları, 1997); and Ergun Özbudun and Serap Yazıcı, “Extrication of Military Regimes from Politics,” in Aleksandra Jasinska-Kania and Jacek Raciborski, eds., *Narod-Wladza-Spoleczenstwo* [Nation, power, society] (Warsaw: Scholar, 1996), 325–40.
- ¹⁵ *TBMM Başkanlığına Bazı Kurum ve Kuruluşlarca Verilmiş ve Ayrıca TBMM’deki Siyasi Partilerin Anayasa Değişikliğine İlişkin Hazırlık Çalışmaları ve Taslak Metinler* [Preparatory studies and draft texts concerning constitutional amendments, as presented to the speaker of the Grand National Assembly of Turkey by certain institutions and associations and by political parties represented in the GNAT] (Ankara: TBMM Başkanlığı, 22 February 1993), 5–230; TÜSİAD’s constitutional draft (1992) is included in the above volume, 5–140; TOBB, *Türkiye Cumhuriyeti Anayasası Önerisi: Anayasa 2000* [Proposal for a constitution of the Republic of Turkey] (Ankara: TOBB, 2000); Türkiye Barolar Birliği [Turkish Union of Bar Associations TBB]; *Türkiye Cumhuriyeti Anayasa Önerisi* [Proposal for a constitution of the Republic of Turkey], (Ankara: TBB, 2001); and also TBB, *Türkiye Cumhuriyeti Anayasa Önerisi: Geliştirilmiş Gerekçeli Yeni Metin* [Proposal for a constitution of the Republic of Turkey: New and improved text with reasonings] (Ankara: TBB, October 2007).
- ¹⁶ These amendments are as follows in chronological order:
1. Law No. 3361, 17 May 1987.
 2. Law No. 3913, 8 July 1993.
 3. Law No. 4121, 23 July 1995.
 4. Law No. 4388, 18 June 1999.
 5. Law No. 4446, 13 August 1999.
 6. Law No. 4709, 3 October 2001.

7. Law No. 4720, 21 November 2001.
8. Law No. 4777, 27 December 2002.
9. Law No. 5170, 7 May 2004.
10. Law No. 5370, 21 June 2005.
11. Law No. 5428, 29 October 2005.
12. Law No. 5551, 13 October 2006.
13. Law No. 5659, 10 May 2007.
14. Law No. 5678, 31 May 2007.
- ¹⁷ Ergun Özbudun, *Contemporary Turkish Politics: Challenges to Democratic Consolidation* (Boulder and London: Lynne Rienner Publishers, 2000), 141–45.
- ¹⁸ For a comparison of the AKP with the predecessor Islamist parties, see: Ergun Özbudun, “From Political Islam to Conservative Democracy: The Case of the Justice and Development Party in Turkey,” *South European Society and Politics*, Vol. 11, No. 3–4 (September–December 2006), 543–57, and the sources cited therein.
- ¹⁹ Ali Çarkoğlu and Binnaz Toprak, *Değişen Türkiye’de Din, Toplum ve Siyaset* [Religion, society and politics in a changing Turkey] (Istanbul: TESEV, December 2006), 75–76.
- ²⁰ Ergun Özbudun, “Debates on the New Turkish Constitution and Secularism,” *Today’s Zaman* (daily), 24 November 2007.
- ²¹ A recent survey has found the Kurdish speakers to make up 12.5%: Ali Çarkoğlu and Ersin Kalaycıoğlu, *Seçim 2007: Devam Eden Eğilimler mi? Yoksa Yeni Başlangıçlar mı?* [2007 elections: Continuing trends or new beginnings] (Istanbul: Açık Toplum Enstitüsü, 2007), 23.

CHAPTER 2

Initial Changes, 1987–1995

The 1982 Constitution—written under the aegis of the military, excluding all political parties and other institutions of civil society, and approved by a highly dubious referendum—became a matter of public debate and contention almost from the moment of its adoption. The MP, however, which was the majority party between November 1983 and October 1991, did not seem to favor major constitutional revisions. Turgut Ozal, Prime Minister and the leader of the MP, often expressed the view that the new institutions created by the 1982 Constitution should be given a chance to function for a time before amendments could seriously be considered. Underlying this position was Ozal's desire to avoid an open confrontation with President Evren, who had declared himself the “guarantor” of the 1982 Constitution. More generally, Ozal often stated that the 1982 Constitution was exceedingly detailed and that its rigidity obstructed government dynamism. In this context, he proposed a constitution that would consist only of a bill of rights. The MP leaders also spoke from time to time in favor of a constitutional amendment to transform the system of government into a semi-presidential one in which the President of the Republic would be directly elected by the people and would have increased powers. No clear party policy has evolved on any of these points, however, and none of these proposals have been energetically pursued.

During 1983–1991, the two major opposition parties (the Social Democratic Populist Party [SDPP] and the TPP) both produced highly detailed constitutional projects. The SDPP project envisaged a classical parliamentary system in which the president of the republic would be elected by a three-fifths majority of the parliament (to assure his or her impartiality) and would have very limited powers. The SDPP plan also emphasized strengthening the independence of

the judiciary, increasing the autonomy of universities, and lifting restrictions on the political activities of trade unions and other civil society institutions. In a sense, the SDPP project meant a return to the basic features of the 1961 Constitution.

The TPP project envisaged a more radical departure from the Turkish constitutional tradition by proposing a semi-presidential system, clearly inspired by the French Fifth Republic model. The President of the Republic would be elected by the people in a two ballot system and would have the power to dissolve the Assembly at his or her initiative, to submit laws to referendum, to return laws to the Assembly for reconsideration (in which case the latter could override the presidential veto not by a simple majority but by an absolute majority of its full membership), and to determine the fundamental principles of national security and foreign policies. The president would also be the head of the Supreme Council of the Judiciary and would therefore have the power to veto nominations for judges. The TPP plan also envisaged removing certain restrictions on civil liberties and on political activities of civil society institutions such as trade unions and voluntary associations.¹

The 1987 Amendments

The only significant amendment to the Constitution during the years of the MP government was adopted by Law No. 3261, dated 18 May 1987. Except for two relatively minor and noncontroversial changes—lowering the voting age from twenty-one to twenty and increasing the number of deputies from 400 to 450—the amendment involved a change in the amendment procedure to make constitutional change somewhat easier and the repeal of provisional Article 4, which had banned political activities by former political party leaders. The amended Article 175 provides for two methods of amendment. One requires a less stringent majority for the adoption of constitutional changes: if the GNAT passes an amendment by a majority greater than three-fifths but less than two-thirds of its full membership, such a bill can become a constitutional amendment, provided it is approved by popular referendum. In such cases, a constitutional referendum is mandatory if the president does not return the bill to the Assembly for reconsideration. If he or she does so, the amendment procedure becomes identical to the second method: if a proposed

amendment is adopted by the Assembly by a two-thirds majority of its full membership, the president has the power to submit it to a referendum. In this case a referendum is optional, unlike the first method of amendment.

In short, the 1987 amendment made the constitution somewhat more flexible than it had been and increased popular control over constitutional change by broadening the scope of a referendum, in which a simple majority of the total number of valid votes cast is sufficient to amend. Prime Minister Özal defended the change in the amendment procedure, pointing out that in the past the failure of political parties to agree on a constitutional amendment to obtain the required two-thirds majority of the parliament led to deadlocks in the political system; hence, constitutional changes had been possible only during periods of military takeover. Therefore, he added, constitutional change should be facilitated by giving the people the final word in cases of a parliamentary deadlock.²

The second important constitutional amendment created by Law No. 3261 was the repeal of the ban on political activities of former party leaders. Although no political party represented in the Assembly made a statement favoring a continuation of the ban, the MP insisted that the repeal must be submitted to a referendum. The opposition parties argued that the ban should be repealed by the parliament alone and that a referendum was both unnecessary and undemocratic. The fundamental political rights of individuals, the opposition insisted, should not be put to a referendum. In the end, however, the TPP deputies, eager for an end to the ban, joined the MP majority in favor of conditional repeal of the ban. The SDPP deputies voted against the draft Article 3, which subjected the repeal of the political bans to a referendum. But the Article was adopted by a majority of 293 to 85. Afterward, some opposition deputies brought the matter to the Constitutional Court arguing that the Constitution could be amended only in accordance with the amendment procedure in force at the time of the amendment. However, the Court rejected the claim of unconstitutionality, since under the Constitution it had the power to review constitutional amendments only on procedural (i.e., whether the amendment is proposed and adopted by requisite numbers of deputies and whether the two debates requirement is complied with), but not on substantive grounds.³ The referendum, held on 6 September 1987, approved the repeal by a hairbreadth majority (50.1%).

The MP, who backed the amendment in the parliament together with other opposition parties, opposed the repeal in the referendum campaign.

The 1988 Amendment Attempt

In 1988 an attempt was made to change Article 127 of the constitution concerning local elections under the new amendment procedure. The original text of the 1982 Constitution (Art. 127, para. 3) provided that local elections should be held every five years. The governing party, the MP, aware of its declining popularity, wanted to anticipate local elections for about a year, and so, in order to overcome the constitutional obstacle submitted a bill to amend Article 127. According to the amendment, local elections would be held every five years, but could be anticipated by the GNAT within one year before the end of the five-year term. The amendment, opposed by the opposition parties, was passed by the Assembly by more than three-fifths but less than two-thirds of the parliament, and consequently was submitted to a mandatory referendum. The referendum that in fact became a popularity test for the MP was held on September 25, 1988, and the proposal was rejected by 65 percent of the popular vote.⁴ The results of the 1987 and the 1988 referenda suggest that the majority of voters tend to vote on the basis of party loyalty rather than on the merits of the proposed constitutional amendment.

The 1993 and 1995 Amendments

The 20 October 1991 elections ended the MP government and brought to power a coalition government of the TPP and the SDPP. Both parties had been highly critical of the 1982 Constitution, and both had promised sweeping constitutional changes in their election campaigns; therefore, one would have expected a radical constitutional change, despite the fact that the combined parliamentary strength of the two parties fell short of the required two-thirds majority and even of a three-fifths majority. The parliamentary arithmetic made it necessary to obtain the support of the MP, the major opposition party, or of all minor opposition parties to achieve constitutional change.

Negotiations took place between the two coalition partners to find common ground for proposing constitutional amendments with the

expectation that other parties would lend their support. In principle, the SDPP favored an entirely new constitution. Given the practical difficulty of accomplishing that aim, it presented a draft in which seventy-five articles of the 1982 Constitution were retained, ninety-six articles were revised, twenty-three articles were abolished, and one new article was drafted.⁵ The TPP did not present a full draft but proposed changes to around thirty articles.⁶ The TPP and the SDPP agreed on the texts of thirteen articles: Article 13 (restrictions on fundamental rights and freedoms); Article 26 (freedom of expression); Article 28 (freedom of the press); Article 30 (protection of printing facilities); Article 33 (freedom of association); Article 34 (freedom of assembly); Article 67 (right to vote); Article 68 (political parties); Article 69 (rules governing the activities of political parties); Article 76 (eligibility to become a member of parliament); Article 81 (the oath of the members of parliament); Article 92 (authorization of the use of armed forces); and Article 133 (radio and television broadcasts). The two also agreed on the repeal of the provisional articles and agreed in principle on a number of other points.⁷

At this point, Hüsamettin Cindoruk, Speaker of the Grand National Assembly, invited all parties represented in the Assembly to present their views on the Constitution. Party leaders met, with Cindoruk presiding, to obtain agreement on those articles that could muster the necessary two-thirds majority. The work of the interparty committee was interrupted for a long period, however, because of political circumstances including the death of President Özal, the election of Süleyman Demirel as President of the Republic, Tansu Çiller's rise to prime minister and leader of the TPP, and the local elections of March 1994. Only the amendment concerning Article 133 was separated from the others because of its special urgency and was approved by a more than two-thirds majority of the Assembly (313 versus 50 votes).⁸ Thus, state monopoly over radio and television broadcasts was abolished, leading to a rapid proliferation of private radio and television stations and consequently to a much greater social and political pluralism.

The interparty committee resumed its work in Spring 1994, again at the initiative of Speaker of the Assembly Cindoruk. After painful and protracted negotiations, an amendment proposal—signed by 301 deputies (more than the two-thirds majority needed to change the

Constitution without a referendum) including the parliamentary group leaders of the TPP, the MP, and the SDPP (now the Republican People's Party [RPP])—was submitted to the GNAT on 15 January 1995. This proposal involved changes to the preamble and twenty articles of the Constitution, the most important of which were these: the first two paragraphs of the preamble underlining the legitimacy of the 1980 military intervention were to be repealed; the ban on the political activities of trade unions, associations, foundations, and public professional organizations and on political cooperation between such civil society institutions and political parties was to be abolished; public employees were to be given the right to unionize and—in a manner regulated by law—the rights to strike and to conclude collective agreements; government controls over the activities of associations, trade unions, and public professional organizations were to be relaxed; the voting age would be lowered to eighteen (from nineteen) and the age of eligibility for parliament to twenty-five (from thirty); instructors and students in institutions of higher learning were to be allowed to become members of political parties; the age for party membership was to be lowered from twenty-one to eighteen; political parties were to be permitted to establish women's and youth branches, foundations, and organizations in foreign countries; the circumstances under which GNAT membership could be lost were to become more liberal; and the provisional Article 15 of the constitution was to be amended to permit judicial review of the constitutionality of laws passed during NSC rule.

The amendment proposal was based on an agreement among the three major parties—the TPP, the MP, and the RPP—and was signed by deputies of those parties. The WP had insisted during the interparty negotiations that the package must include the repeal of the last paragraph of Article 24 of the constitution, which stated that “no one shall exploit or abuse religion or religious feelings, or things deemed sacred by religion in any manner whatsoever, for the purpose of personal or political interest or influence, or for even partially basing the fundamental social, economic, political, and legal order of the State on religious rules.” The WP believed this paragraph was the source of discriminatory and “oppressive” practices against devout Muslims, including the ban on wearing turbans and growing beards for students, civil servants, and even such free professionals as lawyers and engineers. The WP made it clear that it would not vote

for any constitutional amendment that did not include the repeal of this paragraph.⁹

In contrast to the total WP refusal to support the constitutional amendments, the smaller parties represented in the GNAT were much more constructive. Bülent Ecevit, leader of the Democratic Left Party (DLP), reiterated several times that his party considered some of the proposed amendments insufficient, but that all ten DLP deputies would vote in favor—albeit sometimes unhappily—if the amendments constituted even the smallest steps toward a true democracy.¹⁰ Similar attitudes were displayed by the Nationalist Action Party (NAP).¹¹

The Constitutional Committee of the GNAT combined the amendment proposal, signed by 301 deputies, with two other, more specific proposals. One was submitted by Güneş Müftüoğlu (of the TPP) and 170 other deputies to allow the GNAT to postpone or anticipate local elections. The other was submitted by Cemal Tarcan (of the TPP) and 153 colleagues to make parliamentary status compatible with membership in the executive boards of trade unions and public professional organizations.

The proposed texts were changed somewhat by the Constitutional Committee, generally in a more conservative direction, and debate on them began in the plenary session of the GNAT on 14 June 1995. The fact that 301 deputies from three major parties had already signed the proposals and that two minor parties (the DLP and the NAP) also supported them gave the impression that the WP would be alone in opposition and that the amendments would pass easily. Early in the plenary debates, however, it became apparent that this would not be the case. In the first reading, the vote on the entire amendment bill was 298 in favor and 86 opposed, with 4 abstentions—sufficient to continue debates on individual articles but short of the two-thirds majority (300 votes) required for the amendment to be adopted without a referendum. Only seven of the individual articles were adopted by the required three-fifths majority (270 votes), and none received a two-thirds majority. Fifteen articles failed to receive even a three-fifths majority.

There were several reasons for this impasse. First, even though the WP parliamentary group had only forty members, many religiously conservative members of the TPP and the MP sympathized with the WP position and did not vote for the amendments. Second, the compromise between the two government partners (the TPP and

the RPP) on the unionization of public employees was a thin one. A majority of TPP deputies, particularly the influential spokesman of the Constitutional Committee, Coşkun Kırca, would not consider unionization rights if they included the rights to strike and to conclude collective agreements. For the RPP, these rights constituted the most essential part of the package. A compromise solution proposed by the RPP and supported by the MP, the WP, and the small parties that recognized such rights in the constitution, but left their detailed definition and exceptions to ordinary legislation, could not muster the necessary three-fifths majority. Third, a large number of MP deputies gave lukewarm support to the amendments for fear Prime Minister Çiller would try to monopolize the credit for changing the Constitution.¹²

Faced with this deadlock, the Constitutional Committee withdrew some of the proposed amendments, debates were postponed, and a new round of talks took place among party leaders—with the exception of Necmettin Erbakan, the WP leader, who was determined to block constitutional change. Prior to the second reading, the speaker of the GNAT prepared a legal opinion according to which all articles would be voted on in the second reading, regardless of the number of votes they had received in the first reading; articles that received fewer than 270 votes (three-fifths) in the second reading would be rejected; if the amendment bill was approved in its entirety by a two-thirds majority (300 or more votes), no referendum would be needed for any of its articles, even if they received between 270 and 300 votes; if the entire bill was approved with a majority of 270 to 300 votes, all articles would be submitted to a referendum regardless of the number of votes they received in the second reading. These opinions, the constitutionality of which is highly doubtful, were voted on and approved by the Assembly.¹³

The second reading went somewhat more smoothly than the first as a result of compromises reached among party leaders. Consequently, fifteen articles were adopted (seven by more than 300 votes and eight by a majority of 270 to 300 votes) and six articles were rejected, having failed to receive a three-fifths majority. In the final vote on the entire bill on 23 July, there were 360 votes in favor and 32 opposed. Therefore, in accordance with the procedural resolution mentioned earlier, all fifteen articles were adopted without the need for a mandatory popular referendum.

The most important amendments can be summarized as follows: they repealed the two paragraphs of the preamble referring to the necessity and legitimacy of the 1980 military intervention. They repealed the bans on political activities of trade unions, associations, foundations, cooperatives, and public professional organizations and allowed political cooperation between political parties and these civil society institutions. They lowered the voting age to eighteen, increased the number of GNAT members to 550 (from 450), gave Turkish citizens living abroad the right to vote, recognized the right to unionize (but not the right to strike or to conclude collective agreements) for public employees, allowed university instructors and students to become members of political parties, lowered the age of party membership from twenty-one to eighteen, and permitted political parties to establish women's and youth branches, foundations, and organizations in foreign countries.

Suspension of activities of associations and public professional organizations by order of an administrative authority was made more difficult; such orders are to be submitted to the review of a competent judge within twenty-four hours and must be decided on by the judge within forty-eight hours or they automatically cease to be effective. The circumstances under which parliamentary membership is lost were also changed so that changing one's political party would no longer be a cause for loss of membership. Similarly, if a political party is outlawed by the Constitutional Court because of its anticonstitutional activities, only those members of parliament who caused such a decision by their own words or deeds would lose their membership; the status of other party deputies would remain unaffected.

The 1995 amendment also redefined and somewhat limited the grounds for the prohibition of parties. Thus, the amended paragraph four of Article 68 reads as follows:

The status and programs, as well as the activities of political parties shall not be in conflict with the independence of the State, its indivisible integrity with its territory and nation, human rights, the principles of equality and the rule of law, sovereignty of the nation, the principles of democratic and secular Republic; they shall not aim to support or to establish a dictatorship of class or group or a dictatorship of any kind; they shall not encourage the commitment of a criminal offense.

This amendment represented a significant improvement over the original text which contained vague and hard-to-define prohibitions, such as the requirement to stay within the limits of their statutes and programs and of Article 14 (on the abuse of fundamental rights and liberties) of the Constitution.¹⁴ Furthermore, the original Article 69 had stipulated that “the founding members and the administrators at any level of a political party which has been permanently prohibited, shall not become the founding members, administrators or auditors of a new political party; nor shall any new political party be founded, the majority of whose members are former members of a previously prohibited party.” This draconian provision was considerably softened in 1995 by limiting the ban to five years and only to those members who caused the prohibition of the party by their own words and deeds.

Amendments rejected included those that would have given public employees the rights to strike and to conclude collective agreements, that lowered the age of eligibility for parliament to twenty-five (from thirty), that allowed trade union and professional organization officials to sit in parliament, and that permitted judicial review of the constitutionality of laws passed during National Security Council rule. The last item is especially interesting in that during the first and second readings spokespersons from all parties spoke very strongly in favor of the amendment; yet it received only 200 “yes” votes against 184 rejections and five abstentions.¹⁵ Thus, importantly, the National Assembly failed to remove a relic that remained from the military government.

The 1995 constitutional amendments fell far short of popular expectations. Although during the Assembly debates all party spokespersons saw this as a historical opportunity to allow a freely elected civilian parliament to make major democratizing changes to the constitution, the end result did not live up to this hope. The amendments related mostly to the political participation dimension of the Constitution and were useful in that regard, but they brought about no improvements in the rule of law and protection of fundamental rights and liberties. Nevertheless, the amendments provided an example, albeit a limited one, of interparty cooperation—which is not a distinguishing mark of Turkish politics.

Notes

- ¹ *İşleyen Rejim, İşleyen Devlet* [Functioning regime, functioning state] study prepared by Necmettin Cevheri, member of the Central Executive Committee of the True Path Party, Ankara, 1991.
- ² *TBMM Tutanak Dergisi* (hereinafter *Minutes of the GNAT*), Period 17, Legislative Year 4, Vol. 40, Session 102, 13 May 1987, 302.
- ³ Constitutional Court decision, E. 1987/9, K. 1987/15, 18 June 1987, *Anayasa Mahkemesi Kararlar Dergisi* [Reports of the Constitutional Court, hereinafter *AMKD*], Vol. 23, 282–94.
- ⁴ *Resmî Gazete* [Official gazette], 1 October 1988, No. 19946.
- ⁵ *TBMM’de Temsil Edilen Siyasi Partilerce TBMM Başkanlığına Sunulan Anayasa Değişikliği Konusundaki Görüş ve Önerileri* [The views and proposals of political parties represented in the GNAT concerning constitutional amendments, as presented to the speaker of the GNAT] (Ankara: TBMM Başkanlığı, March 1993), 122–73.
- ⁶ *Ibid.*, 37–38
- ⁷ *TBMM’de Temsil Edilen Siyasi partilerin Anayasa Değişikliği Tekliflerinin Karşılaştırmalı Metinleri* [Comparative texts of the proposals of political parties represented in the GNAT concerning constitutional amendments] (Ankara: TBMM Başkanlığı, March 1993), esp. xi–xiv.
- ⁸ *Minutes of the GNAT*, Period 19, Legislative Year 2, Volume 38, Sessions 122, 125.
- ⁹ See, for example, the speech by Şevket Kazan, leader of the WP parliamentary group, during the GNAT debates on constitutional amendment, *Minutes of the GNAT*, Period 19, Legislative Year 4, Vol. 88, Session 123, 14 June 1995, 376–82. Abdullah Gül, deputy from the WP, said that: “while we have this opportunity, let us make a democratic constitution similar to those of the European countries, a constitution that is not afraid of its own people, of its own nation, respectful of the tradition, identity, culture, and religion of its nation” (*Ibid.*, 409–13).
- ¹⁰ *Ibid.*, Period 19, Legislative Year 4, Vol. 89, Session 128, 23 June 1995, 485; Vol. 91, Session 136, 7 July 1995, 37–38.
- ¹¹ NAP deputy Mustafa Dağcı stated that even though some did not quite agree with their views, all seventeen NAP deputies voted “yes” for all of the amendments since they represented an improvement over the existing provisions and the people expected the GNAT to pass them. He went on to say that it was important for the future consolidation of democracy to show that the constitution could be amended by freely elected civilian politicians; *ibid.*, Period 19, Legislative Year 4, Vol. 89, Session 127, 22 June 1995, 317.
- ¹² Ecevit’s remarks on the impasse are pertinent: “A very important duty falls upon the GNAT. If the GNAT had been able to realize at least some of the democratizing changes expected by the society—and there is still this chance—it would have gained great respect and proved the maturity

of Turkish democracy. But unfortunately, constitutional debates seem to be at an impasse now. The GNAT is facing the danger of falling prey to itself, not to outside pressures and threats ... The truth is that the TPP, the RPP, and the MP got involved in an obstinate fight, losing sight of the fact that this was a regime issue. Not only disagreements among these parties but also internal conflicts within each of them prevented a compromise and led to this deadlock." *Minutes of the GNAT*, Period 19, Legislative Year 4, Vol. 91, Session 136, 7 July 1995, 37–38.

¹³ For the text of the Speaker's opinion, see: *ibid.*, Vol. 90, Session 134, 5 July 1995, 559. In the debates on this opinion, only the WP spokesperson pointed out, in our view correctly, the unconstitutionality of this procedure (*ibid.*, 559–67). Two readings are required for constitutional amendments not to facilitate the amendments but to make them more difficult compared with ordinary laws; therefore, articles that received less than the qualified majority of the three-fifths in the first reading should be considered rejected and not be voted on in the second reading. Furthermore, every article of the constitutional amendments should be treated as a separate unit and not be tied to the vote on the entire bill. The issue of constitutionality was not raised before the Constitutional Court, however, since the WP was far short of the numbers (one-fifth of total deputies) necessary to bring about a suit of unconstitutionality. Thus, ironically, certain democratizing changes to the constitution were accomplished through a procedure whose constitutionality is dubious.

¹⁴ Merih Öden, *Türk Anayasa Hukukunda Siyasi Partilerin Anayasaya Aykırı Eylemleri Nedeniyle Kapatılmaları* [The prohibition of political parties because of their unconstitutional activities according to Turkish constitutional law] (Ankara: Yetkin Yayınları, 2003), 54–58.

¹⁵ For the GNAT debates on this amendment, see: *Minutes of the GNAT*, Period 19, Legislative Year 4, Vol. 90, Session 132, 29 June 1995, 274–99; and Vol. 93, Session 146, 22 July 1995, 280–94.

CHAPTER 3

Constitutional Amendments under EU Conditionality 1998–2006

EU as a Democracy Promoter

Having a democratic political system that respects fundamental human rights has always been one of the most important prerequisites to become a full member of the EU. Since the *Birkelbach Report* (1962) of the Political Committee of the European Parliament, which specified the condition of democracy for eventual membership,¹ the Union has developed a comprehensive human rights policy for its external relations, and a well-developed democratic conditionality that specifies the main criteria that must be complied with to become a EU member state. Even though it has not been clearly demonstrated and outwardly stipulated in the official documents of the Community for a long time, democratic principles have been deeply anchored in the Western European political tradition, and they have been enshrined in the spirit of the Community. Therefore, even during the Cold War, the Community has always required a viable democracy from the applicant states to enter the Community.²

Like its democratizing function previously in Southern Europe and recently in the Central and Eastern European countries (CEEC), it is clear that the EU has been functioning as a significant external actor that promotes democracy in Turkey. When taking into account the last amendments on the Constitution and various laws, *inter alia*, which is directly related to Turkey–EU relations, we can safely argue that the relation with the EU has influenced democracy in Turkey.

The EU's influence on constitutional change in Turkey was most strongly felt in the comprehensive 2001 and 2004 constitutional amendments that will be treated in this chapter. The closely related democratization or “harmonization” packages involving a large number of ordinary laws will be discussed in Chapter 4, while Chapter 5 will analyze in detail the impact of EU conditionality upon these reforms.

Parliamentary Immunities: The Unsuccessful Attempt of Constitutional Amendment

Parliamentary immunities have always been important issues in the Turkish public opinion, especially since certain deputies of Kurdish origin were detained by the security forces soon after their immunities were lifted by the GNAT on 2 March, 1994. Later on, the “Susurluk” scandal (in which two members of the True Path Party, TPP, namely Mehmet Ağar, the former Minister of Interior Affairs and Sedat E. Bucak, a member of a landlord family in Southeast Turkey, were accused of having been involved in forming an armed gang to commit crimes and preventing the course of justice) brought the issue of parliamentary immunities onto the agenda. However, in the latter case, the immunities of these members of parliament were not lifted by the GNAT until late 1997. More generally, parliamentary inviolability is seen by a large part of the Turkish public as a shield unfairly protecting deputies from corruption-related charges, while their non-liability on account of their votes and statements during the Assembly proceedings is not contested.

According to Article 83 of the 1982 Constitution, a deputy is entitled to enjoy non-liability with regard to his votes and statements concerning his/her parliamentary functions. Moreover, unless the GNAT lifts his inviolability, he cannot be arrested, interrogated, detained, or tried in relation to an offence, which has been committed before or after his election as a deputy. Except in very few cases, the GNAT usually postponed the lifting of immunity until the end of the term as a *gentlemen's agreement*. Thus, parliamentary inviolability has come to be conceived of as an “absolute immunity” in the public's eyes.

In order to limit the scope of parliamentary inviolability the leaders of the major parties, including the MP, the TPP, and the RPP, with the signatures of 292 deputies submitted a bill to amend Article 83 on parliamentary immunities on 23 January 1997. If the bill had been adopted, a total of 71 Members of Parliament would have faced charges for a total of 133 cases as of late 1997. The amending bill intended to make it possible to interrogate and try a member of parliament in cases of embezzlement, fraud, extortion, bribery, robbery, swindling, counterfeiting, breach of trust, fraudulent bankruptcy, smuggling, conspiracy in official procurements, and sales without the

decision of the GNAT.³ In fact, these offences also disqualify a person to be eligible as a Member of Parliament according to Article 76 of the Constitution. However, the bill stipulated that a deputy could not be detained or arrested without the decision of the parliament.

Deliberations on the report of the Constitutional Committee started on 6 November 1997. The bill was strongly opposed by the WP deputies who argued that the authority of limiting or lifting parliamentary inviolability must be kept in the hands of the representatives of the people as a natural consequence of the principle of national sovereignty. It was commonly argued that the WP had often used the tool of immunity to shelter its local politicians and mayors, who were facing criminal charges, by electing them to the parliament. On the other hand, the ruling parties considered that “the Parliament’s prestige was rapidly being eroded due to the shield of immunity.”⁴

Following the first reading on the whole of the motion of amendment, both articles received fewer votes than the number of signatures on the proposal. This meant that the articles ought to receive at least three-fifths of the total number of the members in the second reading.

The second reading on the bill was subsequently postponed five times. Just before the early general election of 1999, the second reading was held on 17 March 1999 on the urging of the RPP.⁵ The second secret balloting on the bill was held on 22 March 1999. Only 218 out of 357 deputies present voted for the first article of the bill meaning that the article was rejected. The fate of this amendment attempt reflected a strong feeling of self-preservation among deputies despite their partisan differences.

Civilianization of the State Security Courts and Privatization and International Arbitration⁶

Both domestic and international pressures called for reform in the State Security Courts (SSC). These courts were originally introduced into the Turkish legal system by the constitutional amendments of 1973 to deal with offences committed against the integrity and unity of the State with its territory and nation, the liberal democratic order and the Republic (whose characteristics were defined in the 1961 Constitution) and offences which directly involved the security of

the State. With some changes, the 1982 Constitution also included an article on the SSCs.

However, especially the composition of these courts had become a major point of controversy. The SSCs were mixed courts composed of civilian and military judges and public prosecutors. The European Court of Human Rights (ECtHR) has consistently found Turkey in violation of Article 6 of the European Convention of Human Rights (ECHR) in cases involving the SSCs, on the grounds that the military members of such courts did not enjoy the same independence and tenure guarantees as their civilian counterparts and that, therefore, the proceedings of the SSCs were not compatible with the right to a fair trial. The new coalition government of the DLP, the NAP and the MP, which was formed after the early general elections of 18 April 1999, made a strong commitment to reforming the SSCs. A proposal on the amendment of Article 143 of the Constitution was submitted with the signature of the leaders of the coalition parties and 342 deputies in early June 1999. In light of the national and international criticisms, the proposal aimed to civilianize these courts, eliminating military judges and public prosecutors.⁷

During the first reading, which was held on 15 June 1999, the draft Articles 1 and 2 were adopted by votes of 358 versus 81 and 359 versus 68, respectively.⁸ The second reading on the draft amendment proposal was held on 18 June 1999, and it was adopted without any debate or change by a strong majority. On the same day, the GNAT made necessary amendments to the relevant ordinary laws. Thus, the SSCs were civilianized in terms of the composition of the judges and prosecutors who take part in these courts.

As outlined in both the coalition protocol and the government program, the coalition government aimed at lifting the constitutional and legal obstacles to privatization and foreign investment, especially in view of the Constitutional Court rulings that rendered privatization extremely difficult. With this idea in mind a proposal amending Articles 47, 125, and 155 of the 1982 Constitution, which was signed by the leaders of the coalition parties and 282 deputies, was submitted on 20 July 1999. The draft Article 1 amended the title of Article 47 of the Constitution as “Nationalization and Privatization” and added two new paragraphs concerning privatization. The second draft Article introduced national and international arbitration as a mechanism for dispute resolution in granting public service conces-

sions by adding a new sentence to the end of first paragraph of Article 125 of the Constitution. Finally, the draft Article 3 amended the second paragraph of Article 155 of the Constitution on the Council of State's competence in reviewing concession contracts.

During the debates in the Constitutional Committee, held on 23 and 27 July 1999, the members of the opposition parties objected to the amendment concerning "international arbitration" as being incompatible with the concept of "national sovereignty." The opposition deputies also argued that these changes would encourage the spoils system and arbitrary concessions and contracts by the government. However, the Committee adopted the government sponsored proposal without change. The first reading on the Committee's report started on 10 August 1999.⁹ Article 1 was adopted by a vote of 416 to 22 without any debate. A new sentence was added to the first paragraph of Article 2 saying that "international arbitration would be possible only if a foreign party is involved." Then Article 2 was adopted by the votes of 405 versus 22. Article 3 that underlined the advisory nature of the Council of State's review over concession contracts and limited such review to a period of two months was adopted by a vote of 368 to 21. The amendments were also adopted by large majorities in the second reading held on 13 August 1999.¹⁰

The Unsuccessful Attempt to Amend Presidential Elections

A change in the procedure governing the presidential elections had been on the political agenda since Süleyman Demirel was elected to the office following the death of Özal in 1993.

President Demirel, in his inaugural speech at the Parliament on 1 October 1999, called for the introduction of a semi-presidential system.¹¹ In fact, Özal, the ex-president, had also advocated the popular election of the president. The consultation process between political leaders on the presidential election started as early as January 2000. There seemed to be a consensus on changing the current seven year term to a five year term of office and allowing a president to serve two terms instead of the current single term. This would have enabled Demirel to serve for a second term, an idea strongly supported by his archrival Ecevit. There was no consensus, however,

to simply extend President Demirel's term in office. In particular, the VP opposed any such amendment.

The makers of the 1982 Constitution had formulated a seven-year and non-renewable term for the president independent and above party politics. The proposed amendment (the so-called 5 plus 5 formula) would probably have enabled the deputies to exercise more influence over the presidential election.

Following the consultations among the leaders, the TPP submitted an amendment bill on Article 101 of the Constitution on 21 January 2000. To secure the support of the VP to the amendment, Ecevit offered to include Articles 69 and 86 in the package as well.¹²

In fact, these additions could be considered a kind of "political bribe" to achieve the major goal. On the one hand, the VP would be saved from being banned by the Constitutional Court. On the other hand, the amendment to Article 86 would secure deputies' salary increase which had been recently annulled by the Constitutional Court. However, allegations that this agreement was the by-product of the bargaining among political parties or a "bribe" paid to deputies created a negative public mood towards the amendments.

Three joint proposals concerning the above-mentioned constitutional changes were submitted to the Constitutional Committee on March 8 and examined by the Committee on March 23. The Committee approved the triple package with by 17 to 4 votes.¹³ The first reading in the plenary took place on 29 March 2000.¹⁴ Although a total of 407 deputies signed the amendment bill a few weeks ago, separate ballots on each item in the package got fewer and fewer votes in the General Assembly. This proved once again that "signatures do not equal votes." In this first vote on the whole package, almost all deputies from the DLP and the NAP apparently voted in favor while the third partner of the coalition, the MP, and the opposition, the TPP, which had pledged support for the package, voiced serious dissent. A substantial number of the MP and TPP deputies were believed to have voted against, while the main opposition VP voted against it in its entirety.¹⁵

The results disappointed and frustrated Ecevit. Before the second reading on the amendments, a leaders' summit was convened to secure the passage of the bill. To this end Ecevit called deputies to cast their votes openly, contrary to procedure. During the second reading, which was held on 5 April, while the items amending Arti-

cles 69 and 86 were received over 340 votes, Article 101 got only 303 out of 535 votes. According to the procedure, the bill was withdrawn by the Committee.¹⁶ This put an end to Demirel's presidential aspirations for a second term.

The 2001 Amendments

The All-Party Parliamentary Accord Committee, which was a semi-official body composed of two members from each parliamentary political parties and functioning since the April 1999 elections with the aim of finding a common position among parties for constitutional amendments, had reached a consensus on 37 out of 51 proposed constitutional amendments in June 2001 before the parliamentary recess.¹⁷ Meanwhile, civil society associations continued to lobby for political reforms, including constitutional amendments.

On the other hand, the military members of the National Security Council (NSC) seemed to be cool towards some of the amendments proposed by the accord Committee, such as the abolition of the death penalty, lifting the ban on the use of languages other than Turkish in radio and television broadcasting, increasing the number of the civilian members of the NSC, and making the prohibition of political parties more difficult. These members argued that those reforms should be considered in the medium term (meaning the year 2005) rather than short term, and that some of them would encourage separatist tendencies among Kurds.¹⁸

However, the leaders of the coalition government agreed to open the 37-article constitutional amendment proposal, which was drafted by the All-Party Parliamentary Accord Committee, to the signatures of parliamentarians and asked the Speaker of the Parliament, Omer İzgi to call the GNAT to an extraordinary session on 17 September to start debating the reforms.¹⁹

The bill on the draft amendments, which was signed by the leaders of the coalition government and 288 deputies, was submitted to the Speakership of the GNAT on 9 September 2001. The reasoning behind the motion was that the 1982 Constitution needed to be revised in the light of current needs, of public expectations, and of new political developments. In addition, it was mentioned that "it is inevitable to make some amendments to the Constitution as a prerequisite of meeting the economic and political criteria and adopting the required

legal regulations in the process of full membership in the EU,” thus clearly indicating that one of the primary motivations behind the proposed constitutional amendments was to facilitate Turkey’s accession to the EU.

The Constitutional Committee examined the motion on the draft amendments within less than a week and submitted its report the Speakership of the Grand National Assembly on 21 September 2001.²⁰ The Committee made some major as well as minor changes in the draft amendments limiting the scope of the reforms. Although the amendment package was generally approved unanimously, there were fears that some right-wing parties, namely the TPP and the NAP, might collaborate and either force a referendum on the amendments or totally destroy it.²¹

The debates on the whole of the motion of constitutional amendments started on 24 September 2001. Following the speeches of the representatives of the party groups and individual deputies, the Plenary approved opening the debate on the articles by a vote of 428 to 17.²²

On 25 September 2001, the GNAT started to debate the motion article by article. According to Article 1, the phrase “no thoughts or opinions” in the sixth paragraph of the Preamble of the Constitution which, according to Article 176, is an integral part of the Constitution, was replaced with the phrase “no activity.” This amendment was meant to narrow the restrictions that may be imposed on the freedom of thought and expression. Restrictions can now be imposed only in the case of an “activity” that is in violation of the provisions of this paragraph. Although it is debatable whether the term “activity” still encompasses the dissemination of thoughts and opinions, it may be argued that the intention of the constitution-makers was to punish actions rather than the abstract expression of opinions.

While the representatives of the JDP (a split from the banned VP), of the DLP and of the Felicity Party (FP, also a split from the banned VP) made speeches in favor of the draft Article 1, the representatives of the NAP and the TPP opposed to this amendment for fear that the expression of certain thoughts could harm the integrity and unity of the state. Two motions of amendment on this article were read and rejected by the Plenary. Then the draft Article 1 was adopted by the Plenary by a vote of 426 to 24.²³

The original text of Article 13 enumerated general grounds for restricting all fundamental rights and liberties, namely safeguarding

the indivisible integrity of the state with its territory and nation, national sovereignty, the Republic, national security, public order, public peace, public interest, public morals, and public health. In addition to these general grounds, fundamental rights and liberties could also be restricted for the specific reasons stated in the relevant articles. The 2001 amendment deleted the general grounds for restriction. The amended text reads as follows:

Fundamental rights and liberties may be restricted only by law and solely on the basis of the reasons stated in the relevant articles of the constitution without impinging upon their essence. These restrictions shall not conflict with the letter and the spirit of the Constitution, the requirements of democratic social order and the secular Republic, and the principle of proportionality.

The representatives from the JDP, the MP, and the TPP were opposed to the inclusion of the phrase “secular societal order” arguing that only the state could be secular. Then, the vice-chairpersons of the party groups submitted a motion of amendment replacing the phrase “democratic secular order of the society” with “democratic social order and the secular Republic.” The draft Article 2 was read as amended and adopted by the Plenary by a vote of 437 to 17.²⁴

In addition to the deletion of general grounds for restriction, the amendment brought about two important improvements. One is the protection of the *essence* of fundamental rights and liberties, or their irreducible core, which was inspired by the German Constitution and adopted by the Constitution of 1961. The other is the introduction of the principle of *proportionality* which is also widely used in the jurisprudence of the German Constitutional Court. Although both of these principles were used by the Turkish Constitutional Courts prior to the 2001 amendment, their explicit constitutional recognition will, no doubt, provide an additional guarantee for the protection of fundamental rights and liberties. Together with such improvements, the guarantee that restrictions shall not be in conflict with the requirements of the democratic social order (which existed in the original text of the 1982 Constitution as well as in the ECHR) was also maintained. To put it briefly, Article 13 ceased to be a general restrictive clause and became a general protective clause.

The original text of Article 14 dealing with the abuse of fundamental rights and liberties had stated that

none of the rights and liberties embodied in the Constitution shall be exercised with the aim of violating the indivisible integrity of the State with its territory and nation, of endangering the existence of the Turkish State and Republic, destroying fundamental rights and liberties, of placing the government of the State under the control of an individual or a group of people, or establishing the hegemony of one social class over others, or creating discrimination on the basis of language, race, religion or sect, or of establishing by any other means a system of government based on these concepts and ideas.

Article 14 in the draft amendment reads as follows:

None of the rights and freedoms embodied in the Constitution shall be exercised for activities undertaken with the aim of violating the indivisible integrity of the State with its territory and nation, and endangering the existence of the democratic and secular Republic based on human rights.

No provision of the Constitution shall be interpreted in a manner that would enable the State or individuals to destroy the fundamental rights and freedoms embodied in the Constitution, or engage in an activity with the aim of restricting them more extensively than is stated in the Constitution.

The sanctions to be applied against those who undertake activities in conflict with these provisions are prescribed by law.

The last paragraph was added to the original text by the Constitutional Committee. Following the speeches of the representatives of the party groups, no motion of amendment was submitted on the article and it was adopted by a vote of 422 to 19.²⁵

Thus, many of the circumstances which constituted an abuse of rights under the previous version of the Article were eliminated. In its new version, the Article was brought much closer to Article 17 of the ECHR. Another innovation is the recognition that abuse of rights and liberties can be perpetrated not only by individuals but also by the state.

The draft Article 4 amended the first sentence of paragraph five, paragraph six and the last paragraph of Article 19 entitled "Personal Liberty and Security." The phrase: "in the case of offences committed collectively, within fifteen days" in the fifth paragraph dealing with pre-trial detention periods was replaced with the phrase "in the case of offences committed collectively, within seven days."

This revision was crucial due to the fact that, as of 8 November 2001, a total of 255 judgments were rendered by the ECtHR in

respect of cases lodged against Turkey. In 244 of them Turkey was found to have violated the Convention, since according to the ECtHR's case-law, the maximum period of pre-trial detention was four days. Following the debates on the draft, two motions of amendments were submitted to replace the phrase "seven days" with "four days." These motions were approved and then the draft Article with this amendment was adopted by a vote of 440 to 15.²⁶

In the new text, the period for collectively committed crimes was shortened to a maximum of four days. Thus, conformity with the jurisprudence of the ECtHR was assured. Furthermore, the obligation to notify the next of kin without delay was strengthened by eliminating the exceptions to this rule. Finally, it was stipulated that those who suffered damage as a result of unlawful detention or arrest shall be compensated by the state.

The draft Article 5 deleted the third sentence of the first paragraph stating that "exceptions necessitated by judicial investigation and prosecution are reserved" and amended the second paragraph of Article 20 of the Constitution. With the repeal of the above mentioned sentence, the safeguards on the protection of the privacy of the individual and family life were strengthened. The amendment to the second paragraph of Article 20 listed specific reasons for the restriction on the right of privacy as follows: "national security, public order, prevention of offences, protection of public health and public morals, or for the protection of the rights and freedoms of others." In urgent cases, such searches and seizures can be ordered by the competent administrative authority only "in writing" and such decisions shall be:

Submitted for the approval of the competent judge within twenty-four hours. The judge proclaims his decision within forty-eight hours from the time of seizure; otherwise, seizure automatically ceases.

These amendments were adopted by the Plenary without debate and by a vote of 437 to 5. These amendments were designed to fulfill Turkey's commitment to review "the provisions of the Constitution on human rights and freedoms," namely, Political Criteria 2.1.1., "Freedom of Thought and Expression." An identical improvement was made in Article 21 concerning the inviolability of the domicile, and was adopted by 397 votes to 5. Identical guarantees were also adopted with regard to the freedom of communication regulated by Article 22.

The draft Article 8 deleted the phrase “national economic situation” as a ground for restriction from the fifth paragraph of Article 23 concerning the “Freedom of Residence and Movement.” It was adopted by a vote of 430 to 8. This amendment is also designed to fulfill Turkey’s commitment to review “the provisions of the Constitution on human rights and freedoms...” in the EU accession process.

The draft Article 9 made one deletion from and two additions to Article 26 of the Constitution entitled “Freedom of Expression and Dissemination of Thought.” Thus, a small but important change was made in Article 26 by deleting the phrase “language prohibited by law” which was included in the Constitution by its military founders evidently to ban the use of Kurdish. The NSC regime also passed a law to that effect without specifically mentioning Kurdish. This law was repealed in 1991, however, and since that time there has been no language prohibited by law. Nevertheless, the deletion of that phrase constitutes a guarantee against reintroducing such a law in the future. The amendment was adopted by a vote of 397 to 28.

The draft Article 10 repealed the second paragraph of Article 28 of the Constitution on the “Freedom of the Press.” Thus, the provision stating that “Publications can not be made in any language prohibited by law” was deleted from the Constitution. In fact, Law No. 2932 on “Publication in Languages Other Than Turkish” dated 19 October 1983, which banned the usage of the Kurdish language in publications, was repealed by Law No. 3713 dated 12 April 1991. However, this amendment extended the scope of the freedom of the press, and removed possible restrictions on the use of various languages, dialects and tongues. It was adopted by a vote of 391 to 25.²⁷

The draft Article 11 specified the reasons for restrictions on the right of the public to use media owned by public legal entities other than the press regulated in Article 31 of the Constitution. Thus, this right can be restricted only on the grounds of “national security, public order, the protection of public morals and public health.” The article was adopted by a vote of 442 to 14.

The first paragraph of Article 33 of the Constitution on the “Freedom of Association” was rewritten as follows: “Everyone has the right to form associations without prior permission, and to become a member in them, or to withdraw from membership.” The original second paragraph read:

Submitting the information and documents stipulated by law to the competent authority designated by law suffices to enable an association to be formed. If the information and documents submitted are found to contravene the law, the competent authority applies to the competent court for the suspension of activities or dissolution of the association involved.

By the amendment this was deleted, thereby easing restrictions on the establishment of associations. Moreover, some specific reasons for the restrictions to this right, such as “national security, public order, prevention of offences, public health and public morals, and for the protection of the freedoms of others,” were added to this article as the third paragraph in view of the fact that the general grounds of restrictions were deleted from Article 13. The Article was adopted by a vote of 447 to 9.

The draft Article 13 amended Article 34 of the Constitution on “the Right to Hold Meetings and Demonstration Marches.” Thus, the second, fourth and fifth paragraphs of Article 34 that had authorized administrative authorities to postpone such meetings or to determine their sites and routes, and had prohibited associations, foundations, labor unions, and public professional organizations to hold meetings outside the sphere of their proper activities were deleted. The Article was adopted by a vote of 447 to 15.

The draft Article 14 added the phrase “the right to fair trial” to the first paragraph of Article 36 under the title “Freedom to Seek Justice.” Thereby, an additional safeguard for the protection of human rights was included in the Constitution. Turkey had to pay millions of dollars as compensation due to the judgments of the ECtHR on the violation of the principles of fair, impartial and independent trial in Turkey. No motion of amendment was submitted on this draft Article and it was adopted by a vote of 437 to 14.

One of the most controversial amendments was introduced by the draft Article 15 on Article 38 of the Constitution under the heading “Principles Relating to Offences and Penalties.” Thus, a sentence stating that “the death penalty shall not be imposed excepting the cases of war, imminent war and crimes of terror” was added to the seventh paragraph of the article, thereby restricting the cases in which the death penalty could be imposed. Secondly, a new sentence which reads that “Findings obtained in a manner not in accordance with the law cannot be considered as evidence” was added to paragraph five

of Article 38. This amendment provided a safeguard against the use of evidence obtained through such means as maltreatment and torture. Thirdly, in light of Article 1 entitled "Prohibition on Imprisonment for Debt" of the Protocol No. 4 of the ECHR, a new paragraph which reads that "No one can be deprived of his liberty merely on the grounds of inability to fulfill a contractual obligation" was inserted in the old paragraph six of Article 38. Both principles were long established in the Turkish legal system; however, they were now elevated to the constitutional level.

During the debates, the Constitutional Committee proposed a motion to replace the phrase "imminent war" by the phrase "imminent threat of war" and the draft Article 15 was adopted with this change by a vote of 368 to 65.

The draft Article 16 added a second paragraph to Article 40 of the Constitution on the "Protection of Fundamental Rights and Freedoms" which reads as follows: "The State is obliged to indicate in its transactions, the legal remedies and the authorities to whom the persons concerned could apply and their time limits." The draft Article 16 was adopted by a vote of 407 to 13.

In the context of improving equality between men and women the draft Article 17 added the phrase "and is based on the equality between the spouses" to the first paragraph of Article 41 of the Constitution on the "Protection of Family," following the sentence "The family is the foundation of Turkish society," and it was adopted by a vote of 393 to 23.

The amendment to Article 46 on expropriations substitutes the phrase "true compensation" for the word "compensation." True compensation has to be interpreted in the sense of the actual market value of the expropriated property. The amendment also abolished other criteria used in calculating the amount of compensation, such as tax declarations, official assessment of the current price, unit prices, and construction costs. Furthermore, in cases where the payment of compensation is made in installments, the highest interest paid on public claims has to be paid, instead of the highest interest paid on public debts. These changes have significantly strengthened the right to property. The draft article was adopted by a vote of 406 to 10.²⁸

The draft Article 19 amended the second paragraph and deleted the third paragraph of Article 49 titled "The Right and Duty to Work." According to this change, the phrase "and the unemployed" is added

after the term “workers” and the phrase “and to secure labor peace” after the term “unemployment” to the second paragraph. The amended article adopted by a vote of 414 versus 11 reads as follows:

The State takes the necessary measures to raise the standard of living of workers, and to protect workers and the unemployed in order to improve the general conditions of labour, to promote labour, to create suitable economic conditions for the prevention of unemployment and to secure labor peace.

Articles 51 and 52 governing the right to form labor unions had been extensively amended in 1995, as was explained above. The Article 51 was amended again in 2001 substituting the word “employees” for the “workers,” thus extending the right to unionize to public employees without, however, granting them the right to strike. Furthermore, the administrative authorities’ power to request the courts to suspend or dissolve the union, in case the union’s formation documents are not in conformity with law, was abolished. Also abolished were paragraphs six and seven of the Article which had stated that employment in a given workplace shall not be made conditional upon being or not being a member of a labor union, and required an at least ten years of service as a laborer in order to be eligible for an executive office in a labor union. The article was adopted by a vote of 424 to 11.

The draft Article 21 added the phrase “the living conditions of the workers” to the third paragraph of Article 55 of the Constitution entitled “Guarantee of Fair Wage” as one of the defining factors to be taken into consideration when setting the minimum wage, thereby reinforcing the social function of the State. In the debates, the FP deputies submitted a motion adding a new paragraph to the draft Article 21 to the effect that the “minimum wage shall be exempted from tax.” However, it was rejected by the Plenary and the draft Article 21 was adopted by a vote of 427 to 8.

The draft Article 22 amended Article 65 of the Constitution on the limits of the State’s economic and social duties. Thus, the phrase “the maintenance of economic stability” was replaced by the phrase “the priorities consistent with the aims of these duties.” This amendment was adopted by a vote of 432 to 15 without any serious debate and amendment.

To ensure equality between men and women, Article 66 was changed to replace the sentence “citizenship of a foreign father and

a Turkish mother shall be determined by law” with the sentence “the child of a Turkish father or a Turkish mother is a Turk.” It was adopted by a vote of 435 to 12.

The draft Article 24 amending Article 67 entitled the “Right to Vote, to be Elected and to Engage in Political Activity” extended the right to vote to those convicts in penitentiaries convicted of a crime of negligence. The amendment further stipulated that: “the amendments made in electoral laws shall not apply to the elections to be held within a year from the date the amendments go into force.” This provision was designed to prevent last minute electoral manipulations by parliamentary majorities. The draft Article 24 was adopted by a vote of 441 to 10 without any change.

Article 68 and 69 on the regulation and prohibition of parties had been extensively amended in 1995. The constitutional provisions concerning political parties were amended again in 2001 to make the prohibition of parties more difficult. According to the amended sixth paragraph of Article 69, the dissolution of a political party on account of its activities contrary to the provisions of the fourth paragraph of Article 68 may be decided only when the Constitutional Court determines that it has become a focal point of such activities. A political party can be deemed to have become the focal point of such activities when they are undertaken intensively by the members of that party and when these actions are implicitly or explicitly approved by the general convention, or the chairperson, or the central decision-making or executive organs, or by the plenary session of its parliamentary group or its executive committee, or when these actions are directly carried out by the above-mentioned party organs. It was also stipulated in the amended Article 69 that the Constitutional Court may decide to deprive a party totally or partially of state funds, instead of closing it down permanently, depending on the gravity of the violations. A third change involving the prohibition of political parties was made in Article 149, according to which the Constitutional Court may decide to prohibit a party only by a three-fifth majority of its members instead of a simple majority. Thus, with the constitutional amendments of 1995 and 2001, the constitutional guarantees for political parties were significantly strengthened.

During the debates, the FP and the JDP deputies especially criticized the political ban on the members of a political party whose acts and statements caused the party to be dissolved permanently, for a

period of five years which was stipulated by paragraph seven of Article 69. Three motions of amendment were submitted by the FP deputies demanding a reduction of the five-year political ban period to four-years in order to lift Necmettin Erbakan's—former chairman of the banned WP—ban by February 2002, but all were rejected by the Plenary. Then, the draft Article 25 was adopted by a vote of 428 to 28.

The draft Article 26 amended Article 74 of the Constitution entitled the "Right to Petition." According to this amendment, after the word "citizens," the phrase "and foreigners resident in Turkey in accordance with the principle of reciprocity" was added to the first paragraph, and after the phrase "in writing" the phrase "without delay" was added to the second paragraph. During the debates, the deputies complained about the delays in responding to the petitions in Turkey. Then the draft Article 26 was adopted by a vote of 383 to 18.

The draft Article 27 proposed to replace the phrase "ideological and anarchistic activities" by the phrase "terror activities" in the second paragraph of Article 76 entitled "Eligibility to become a Deputy." The draft Article was adopted by a vote of 369 to 54. This amendment was crucial to the political future of Recep Tayyip Erdoğan, the leader of the JDP, who had been convicted to a prison term for a crime considered to be an "ideological crime" by the Electoral Law. The amendment was rejected in the second reading, however, as will be spelled out below.²⁹

The draft Article 28 amended Article 83 entitled "Parliamentary Immunity." It repealed the fourth paragraph of Article 83 which read as "Investigation and prosecution of a re-elected deputy is subject to the renewed waiver of immunity by the Assembly." The draft Article 28 added three new paragraphs to the original text as follows:

The proceedings on inviolability must be completed within three months commencing from the date of its reception by the Assembly. Voting on the lifting of inviolability shall be cast by a secret ballot of the Plenary Session.

Criminal suits concerning deputies shall be tried by the Court of Cassation. The principles according to which the preliminary investigation is carried out, the initiation of a public suit, the appeal against the sentence, and other principles of trial shall be regulated by law.

The amendment was adopted by a vote of 355 to 78, in other words, by less than a two-thirds majority.³⁰

The draft Article 29 added the following sentence to Article 86 of the Constitution entitled "Salaries and Allowances": "The present and retired members of the Grand National Assembly of Turkey are associated with the Pension Fund of the Republic of Turkey and those who are no longer members of parliament may continue to be associated with the Fund upon their request." The draft Article 27 was adopted by a vote of 407 to 20 without any debate.

The draft Article 30 concerning Article 87 of the Constitution on the powers of the GNAT repealed the phrase "excluding those who have been convicted for activities set out in Article 14 and added the phrase "with the majority decision of three-fifths majority of the total number of members of the Grand National Assembly of Turkey." Both amendments concerned the Assembly's right to declare an amnesty. Thus, while in one sense the Assembly's powers were broadened to include the cases regulated by Article 14 of the Constitution, it was restricted in another sense by requiring a three-fifths majority for the declaration of an amnesty. The draft article 30 was adopted by a vote of 389 to 17.³¹

The draft Article 31 slightly amended Article 89 of the Constitution concerning the President's power to promulgate laws or to return them to the GNAT for reconsideration. The amended text reads as follows: "In the event of being deemed partially unsuitable by the President, the Grand National Assembly of Turkey may only deliberate those articles deemed to be unsuitable." The article was adopted by a vote of 374 to 11.

The draft Article 32 proposed to add the following sentence to the last paragraph of Article 90 concerning the ratification of international treaties: "In cases where there is a conflict between laws and the international treaties, the latter take precedence." Only 221 votes were cast in favor of this amendment, which was less than the three-fifths majority of the votes as required by Article 175 of the Constitution.

The draft Article 33 amended the fourth paragraph of Article 94 regulating the election of the Speaker of the GNAT and shortened the period for nominations from ten days to five days, and it was adopted by a vote of 370 to 20.

The draft Article 34 amended Article 100 entitled "parliamentary investigation," and required a secret ballot for the resolution to send

the ministers to the High Court (Constitutional Court) for trial. It also stipulated that the Investigation Committee's report be debated in the Plenary within ten days of its submission, in order to speed up the process. The draft article was adopted by a vote of 434 to 18.

The draft Article 35 amended Article 118 entitled "the National Security Council." It stipulated that the "Deputy Prime Ministers" and the "Minister of Justice" were to be included as permanent members of the Council. Thus, with this amendment the civilian members constituted a majority in the Council. It also replaced the phrase "taking decisions" in the third paragraph with the phrase "the advisory decisions that have been taken," thereby emphasizing the advisory nature of the National Security Council decisions. Finally, instead of requiring the Council of Ministers to "give priority consideration" to the decisions of the National Security Council, it simply stated that the Council of Ministers shall "evaluate" such decisions, thereby also underlining the advisory character of the NSC decisions. The draft article 35 was adopted by a vote of 399 to 32.

The draft Article 36 amended Article 149 related to procedures of the Constitutional Court. It stipulated that in party prohibition cases, the Constitutional Court shall hear the oral defense of the party concerned. It also provided for a three-fifth majority of the Court for prohibition rulings. The amendment was adopted by a vote of 429 to 13.

The draft Article 37 deleted the last paragraph of the Provisional Article 15, which had been one of the most controversial issues since 1983, which had read as follows:

No allegation of unconstitutionality can be made in respect of laws or decree laws enacted during this period (i.e., the period of the NSC rule, 1980–1983) or decisions and measures taken under Law No. 2324 on the Constitutional Order.

This amendment was considered an important step forward in the process of democratization. The draft article was adopted by a vote of 423 to 13. Thus, the Constitutional Court was empowered to review the constitutionality of such laws and to contribute to the liquidation of the authoritarian legacy of the NSC regime. However, it may take many years to do so, since the Constitutional Court was allowed to exercise constitutional review only by way of incidental proceedings (concrete norm control) and not by way of principal proceedings (abstract norm control).³²

The second reading on the draft amendment bill started on 2 October 2001. During the second reading, the draft Articles 1, 3, 4–24, 26, 30–31, 33, 35–36, and 38 were adopted by the required majority of votes without any debate and change. The draft Article 27, which amended Article 76 of the Constitution concerning eligibility to Parliament, received 294 votes, which was less than the required quorum in the second reading, and was excluded from the final package. Thus, Erdoğan of the JDP lost the chance to return to politics. The draft Article 28, on parliamentary immunities also failed to secure the required support in the second reading because it received only 295 votes and was dropped from the amendment package. In this case, the opposition deputies, especially the FP and the JDP deputies, were influential in the rejection of the amendment maintaining that deputies should be protected for their parliamentary activities. Also rejected was the amendment to Article 90 of the Constitution, placing international treaties above national legislation, receiving only 244 votes. Finally, the draft amendment bill was voted as a whole, excluding the defeated Articles 27, 28, and 34, and adopted by a vote of 474 to 16.

The President of the Republic, Ahmet Necdet Sezer, approved the amendment law with the exception of the amendment to Article 86 that brought about improvements in the salaries and allowances of the deputies, and received strong negative reactions from the public. Instead of referring it to the Parliament for reconsideration, he chose to put this amendment to a referendum.

The Parliament could not risk a referendum on the amendment concerning the pay raise for deputies. Thus a proposal amending Article 86 of the Constitution was proposed by Devlet Bahçeli, the leader of the NAP, and Mesut Yılmaz, the leader of the MP, together with 311 deputies. The proposal basically meant a return to the text in the original amendment proposal, and it was adopted by an overwhelming majority on 21 November.

The 2001 constitutional amendments were the most extensive changes that the 1982 Constitution has undergone so far, involving 34 articles. While some of them were relatively minor “cosmetic” changes, others were important steps in the liberalization and democratization process. Particularly noteworthy are those that deleted the general grounds for restricting fundamental rights and liberties from Article 13, shortening the pre-trial detention period to four days as stipulated by the rulings of the Court, deleting the notorious phrase

“language prohibited by law” from Articles 26 and 28, making the prohibition of political parties more difficult, reforming and to a certain extent civilianizing the National Security Council, and repealing the third paragraph of the Provisional Article 15, thus allowing the Constitutional Court to review laws passed during the NSC rule (1980–1983). Also significant is the fact that these amendments were the product of intense negotiations and compromises within the so-called “accord committee” composed of the representatives of all parliamentary parties, and that they were adopted through broad inter-party agreements. Such agreements in constitutional matters are a good omen for Turkish politics, which had displayed a singular lack of capacity for inter-party compromises in the 1950s, 1960s, and 1970s.³³

The 2002 Amendments

In the early general elections of 3 November 2002, the JDP won a landslide victory and gained 363 seats with 34.29 percent of the vote as a consequence of the ten percent national threshold. In this two-party parliament, the RPP won 178 seats with 19.38 percent of the vote. A total of nine independents also entered the parliament. However, many of the established parties, including the last coalition partners, namely the DLP, the MP, and the NAP, as well as the opposition TPP and the FP were left out of the Parliament.

Then a constitutional amendment process was started by the JDP to enable Erdoğan to become a deputy and the Prime Minister. Erdoğan was barred from running in national elections because of a past conviction for “inciting religious hatred,” for a poem he recited at a meeting of the WP in Siirt in December 1997.

Meanwhile, on 2 December 2002, the Supreme Board of Election cancelled the elections in Siirt province on the grounds that there were some irregularities in three ballot boxes in a village of the Province. This decision accelerated the efforts to make the necessary amendments to the Constitution for Erdoğan’s future. A proposal amending Articles 76 and 78 of the Constitution, and adding a provisional article concerning the implementation of Article 67 of the Constitution was submitted by Salih Kapusuz, deputy chairman of the JDP group and 244 deputies on 3 December 2002.

The first reading on the motion started on 10 December 2002. The first article replaced the phrase “ideological and anarchistic actions” in the second paragraph of Article 76 of the Constitution with the phrase “terror actions,” as crimes barring eligibility to Parliament. The draft Article 2 added a fifth paragraph to Article 78 of the Constitution which reads as follows:

Apart from the cases prescribed above, in case a province or an electoral district remains without a member in the Grand National Assembly of Turkey, by-election is held in the first Sunday after 90 days following the vacancies. Provision of the third paragraph of Article 127 of the Constitution shall not be applied at the elections which will be held as required by this paragraph.

The Provisional draft Article 1 stated that “the last paragraph of Article 67 of the Constitution (stipulating that the amendments made in the electoral laws shall not be applied in the elections to be held within the year from when the amendments go into force) is not applied in the first by-election to be held within the course of 22nd Period of GNAT.” All three articles were adopted by overwhelming majorities, with the support of the opposition RPP.

Despite the overwhelming support of the deputies on the constitutional amendments, President Sezer vetoed the Law No. 4774 on 19 December 2002 and returned it to the GNAT for a second consideration according to the provision of Article 175 of the Constitution. In his statement, President Sezer stated that the amendments contradicted the principle of the rule of law, arguing that laws must be general and objective, and not aimed at a single individual. The JDP leadership, however, was intent on passing the Constitutional amendments without any change, and on reconsideration they were adopted by large majorities.³⁴

The Attempts to Reduce the Minimum Age for Eligibility to Parliament and the Sale of Deforested Lands

Soon after the election of Tayyip Erdoğan as a Member of Parliament and becoming the Prime Minister, a total of 216 deputies from the JDP submitted a proposal to amend three articles of the Constitu-

tion on 24 March 2003. One of the amendments involved reducing the minimum age for eligibility to parliament from 30 to 25. A second one intended to allow the management of state forests by private persons. The third and most controversial amendment aimed to rewrite Article 170 allowing the sale of public lands which technically and scientifically ceased to be forests before 31 December 1981.

The Plenary started to debate the whole proposal on 1 April 2003. During the debates the RPP, the main opposition party, supported Article 1 on reducing the age limitation for eligibility, but was strongly opposed to the sale of deforested lands. While the representatives of the JDP claimed that sale of deforested lands was a public necessity due to the illegal occupation of individuals on these lands, the RPP representatives argued that this could cause enormous unjust gains at the expense of social objectives.³⁵

President Sezer returned the law to the parliament to be reconsidered.³⁶ In the President's veto statement, it was stated that the sale of deforested lands were in conflict with the principles of "public interest," "state governed by the rule of law," and "justice." In addition, he argued that the new regulation might motivate the destruction of forestry as it had been practiced in Turkey during the period of 1961–1983 as a consequence of a similar regulation. In order to protect, expand, and develop forest lands, the state's supervision and observation of forest lands were required. Therefore, forest lands must belong to the state and be managed by the state.

In order to facilitate the passage of the amendments, the Constitutional Committee agreed to make certain changes in line with the presidential veto, and the amendments were adopted with sufficient votes on 29 July 2003.³⁷ However, President Sezer vetoed Law No. 4960 on the same grounds as he had expressed in his first veto statement.

Thus, the JDP government's aim to obtain an estimated 25 billion dollars in revenue through the sale of deforested lands was not realized. According to Article 175 of the Constitution, if the parliament passed the bill without any change, the president could either approve it or call for a referendum. Under those circumstances, the government could not take a risk because a referendum could mean a vote of confidence at the same time.

The 2004 Amendments

The 2004 constitutional amendments were also strongly motivated by the process of Turkey's accession to the EU, as was clearly stated in the reasoning of the amendment proposal. The amendment package that involved changes in ten articles was one of the most significant steps in Turkey's liberalization and democratization process. In addition to the total abolition of the death penalty, the amendments involved the strengthening of gender equality, establishing the superiority of international human rights conventions over domestic legislation, the abolition of the controversial state security courts, and the opening of the expenditures of the armed forces to the auditing of the Court of Accounts. Thus, the amended Article 38 explicitly prohibited the imposition of the death penalty, and references to the death penalty in Articles 15, 17, and 87 were deleted. It will be recalled that by the constitutional amendment of 2001, the death penalty was already limited to crimes committed in times of war or the imminent threat of war, and terror crimes, and the terror crimes exception was eliminated by Law No. 4771 dated 3 August 2002. Now this penalty was abolished in all cases, thereby removing the constitutional obstacle to the ratification by Turkey of the 13th Additional Protocol to the ECHR. Another amendment to Article 38 permitted the extradition of Turkish citizens on account of an offense related to the jurisdiction of the International Criminal Court.

An amendment to Article 30 abolished the exceptions to the rule that printing presses and their annexes shall not be seized, confiscated, or barred from operation on account of their being an instrument of crime. An amendment to Article 10 strengthened gender equality by stating that "women and men have equal rights. The state is obliged to put this equality into effect." An amendment to Article 145 abolished the state security courts that had already been civilianized by the constitutional amendment of 1999. An amendment to Article 160 opened the expenditures of the armed forces to the auditing of the Court of Accounts, while an amendment to Article 131 eliminated the military member from the Board of Higher Education.

Probably the item of most consequence of the package was the amendment to Article 90 which states that in case of a conflict between domestic laws and the international agreements concerning fundamental rights and liberties, which were duly put into effect,

international agreements shall take precedence. Previously, Article 90 of the Constitution had stipulated that international agreements shall have the same value as domestic laws, and it was generally agreed that in case of a conflict between the two, the rules *lex posteriori derogat legi anteriori* (posterior law abrogates prior laws) and *lex specialis derogat legi generali* (special law abrogates general law) would apply. The present arrangement puts international agreements on fundamental rights and liberties somewhere in between constitutional laws and ordinary legislation, as in the case in France. With this reform, a much more effective application of the ECHR and other international human rights instruments can be expected.

The amendment package was also supported by the opposition RPP and adopted by overwhelming majorities. Only, during the debates the RPP spokespersons advocated a stronger commitment to affirmative action (positive discrimination) in favor of women, but such motions were rejected.³⁸

The Constitutional Amendments of 2005 and 2006

On 9 September 2004, the Constitutional Court annulled paragraph “a” of Article 6 of Law No. 3984 on the Establishment of Radio and Television Enterprises and Their Broadcasts concerning the election of five members of the Supreme Board of Radio and Television (RTÜK) by the Grand National Assembly. On 24 April 2005, the ruling JDP deputies submitted a motion concerning the election of RTÜK members by adding a new paragraph to Article 133 of the Constitution. The proposal provided for the election of nine RTÜK members by political parties in parliament in proportion with their number of seats. It also stipulated that the regulation of the duties and legal authority of RTÜK and the qualifications of its members, their elections and the duration of their duty shall be determined by law. The amendment was adopted by parliament, with 378 deputies voting for and 21 against, with two abstentions.³⁹

President Sezer vetoed the law, arguing that the Board must be independent and impartial, and that the appointment of party members would not be appropriate. Upon reconsideration, the GNAT readopted the same bill with a majority of 397 to 23.⁴⁰

A second and rather technical amendment was adopted in 2005 concerning the budgeting process. This amendment, also supported by the opposition RPP, was adopted almost unanimously.⁴¹

In October 2006, the Assembly almost unanimously adopted an amendment to Article 76 of the Constitution to lower the age of eligibility to become a Member of Parliament from 30 to 25 (Law No. 5551, dated 17 October 2006).

Notes

- ¹ “Only states which guarantee on their territories truly democratic practices and respect for fundamental rights and freedoms can become members of our community.” Rapport de la Commission politique de l’Assemblée Parlementaire Européenne sur les aspects politiques et institutionnels (15 January 1962), Document 122, Janvier 1962 (Archives of the European Communities, 07.515:32); and Pridham (1991), 215.
- ² Although Treaty of European Community 237 conditioned membership exclusively to the European condition of the applicant state, European-ness had been understood as normative terms, together with its geographical connotations. Now, Article 49 of the Treaty of European Union “Any European State which respects the principles set out in Article 6 (1) may apply to become a member of the Union.” Article 6 (1) establishes “democracy” and “respect for human rights and fundamental freedoms” as foundational principles of the Union.
- ³ For the Constitutional Committee’s Report, see: *Minutes of the GNAT*, Period 20, Legislative Year 3, Volume 36, Session 16.
- ⁴ *Turkish Probe* (Ankara), 30 November, 1997, Issue 255.
- ⁵ *Minutes of the GNAT*, Period 20, Legislative Year 4, Volume 71, Session 56. *Minutes of the GNAT*, Period 20, Legislative Year 3 Volume 35, Session 11.
- ⁶ For a detailed analysis on these amendments, see: Ömer Faruk Gençkaya, “Republic of Turkey-Supplement,” *Constitutions of the Countries of the World*, Release 99–7 (Dobbs Ferry, New York: Oceana Publications, Inc., November 1999).
- ⁷ For the text of proposal and the Committee’s report, see: the Appendix to *Minutes of the GNAT*, Period 21, Legislative Year 1, Volume 1, Session 15.
- ⁸ *Minutes of the GNAT*, Period 21, Legislative Year 1, Volume 1, Session 15, 326–71.
- ⁹ *Minutes of the GNAT*, Period 21, Legislative Year 1, Volume 9, Session 46, 40–113.
- ¹⁰ *Minutes of the GNAT*, Period 21, Legislative Year 1, Volume 9, Session 49, 9–18.
- ¹¹ *Minutes of the GNAT*, Period 21, Legislative Year 2, Volume 13, Session 1.
- ¹² *Turkish Daily News* (Ankara), 3 March 2000.
- ¹³ For the Committee’s report see, *Minutes of the GNAT*, Period 21, Legislative Year 2, Volume 29, Session 73, Appendix.
- ¹⁴ *Minutes of the GNAT*, Period 21, Legislative Year 2, Volume 29, Session 73.
- ¹⁵ *Turkish Daily News* (Ankara), 30 March 2000.
- ¹⁶ *Minutes of the GNAT*, Period 21, Legislative Year 2, Volume 30, Session 76.

- ¹⁷ *Turkish Daily News* (Ankara), 15 June 2001.
- ¹⁸ *Turkish Daily News* (Ankara), 22 August 2001.
- ¹⁹ *Turkish Daily News* (Ankara), 5 Eylül 2001.
- ²⁰ For the text of the motion of constitutional amendments and the Commission's report, see: *Minutes of the GNAT*, Period 21, Legislative Year 3, Volume 70, Session 131, Appendix.
- ²¹ *Turkish Probe* (Ankara), 23 September 2001.
- ²² *Minutes of the GNAT*, Period 21, Legislative Year 3, Volume 70, Session 131, 46.
- ²³ *Minutes of the GNAT*, Period 21, Legislative Year 3, Volume 70, Session 131, 83.
- ²⁴ *Minutes of the GNAT*, Period 21, Legislative Year 3, Volume 70, Session 132, 98.
- ²⁵ *Minutes of the GNAT*, Period 21, Legislative Year 3, Volume 70, Session 132, 101.
- ²⁶ *Minutes of the GNAT*, Period 21, Legislative Year 3, Volume 70, Session 132, 107.
- ²⁷ On the Assembly debates on Articles 20, 21, 22, 23, 26, and 28 of the Constitution, see: *Minutes of the GNAT*, Period 21, Legislative Year 3, Volume 70, Session 102, 107–33.
- ²⁸ On the Assembly debates on Articles 31, 33, 34, 36, 38, 40, 41, and 46 of the Constitution, see: *Minutes of the GNAT*, Period: 21, Legislative Year: 3, Volume: 70, Session: 133, 141–204.
- ²⁹ On the Assembly debates on Articles 49, 51, 55, 65, 66, 67, 69, 74, and 76, see: *Minutes of the GNAT*, Period 21, Legislative Year 3, Volume 70, Session 134, 211–271.
- ³⁰ Ergun Özbudun, "Constitutional Debates on Parliamentary Inviolability in Turkey," *European Constitutional Law Review*, Vol. 1, Issue 2 (2005), 272–80.
- ³¹ On the Assembly debates on Articles 86 and 87 of the Constitution, see: *Minutes of the GNAT*, Period 21, Legislative Year 3, Volume 70, Session 131, 280–88.
- ³² On the Assembly debates on Articles 89, 90, 94, 100, 118, 119, and the Provisional Article 15, see: *Minutes of the GNAT*, Period 21, Legislative Year 3, Volume 70, Session 135, 93–347.
- ³³ On general evaluations of the 2001 amendments, see: Ergun Özbudun, *2001 Anayasa Değişiklikleri ve Siyasal Reform Önerileri* [The 2001 constitutional amendments and proposals for political reform] (Istanbul: TESEV, 2004); Serap Yazıcı, "Türk Silahlı Kuvvetlerinin Yetki ve Ayrıcalıkları: Sivilleşmeye Yönelik Anayasal ve Yasal Reformlar" [The powers and privileges of the Turkish Armed Forces: Constitutional and legal reforms toward civilianization], *Hukuk ve Adalet*, Vol. 1, No. 4 (Ekim-Aralık, 2004), 228–51; Mustafa Erdoğan, "Anayasa Değişiklikleri Ne Getiriyor?" [What do the constitutional amendments bring about?], in *Anayasa ve Özgürlük* [The constitution and liberty] (Ankara: Yetkin Yayınevi, 2002), 67–75; Ömer Faruk Gençkaya, "Politics of Constitu-

tional Amendment in Turkey,” in Gisbert H. Flanz (ed.), *Constitutions of the Countries in the World* (Dobbs Ferry, NY: Oceana Publications, February 2003), ix–lix; Levent Gönenç, “The 2001 Amendments to the 1982 Constitution of Turkey,” *Ankara Law Review*, Vol. 1, No. 1 (Summer 2004), 89–109; Kemal Gözler, *Anayasa Değişikliği Gerekli mi? 1982 Anayasası için bir Savunma* [Is constitutional revision necessary: A defense for the 1982 Constitution] (Bursa: Ekin, 2001); Esin Örüçü, “The Turkish Constitution Revamped,” *European Public Law*, Vol. 8, No. 2 (2002), 201–18.

³⁴ *Minutes of the GNAT*, Period 22, Legislative Year 3, Session 104.

³⁵ *Minutes of the GNAT*, Period 22, Legislative Year 1, Session 59.

³⁶ For the President’s statement, see: *Minutes of the GNAT*, Period 22, Legislative Year 1, Session 69.

³⁷ *Minutes of the GNAT*, Period 22, Legislative Year 1, Session 112.

³⁸ *Minutes of the GNAT*, Period 22, Legislative Year 2, Sessions 83 and 86.

³⁹ *Minutes of the GNAT*, Period 22, Legislative Year 3 Session 104.

⁴⁰ *Minutes of the GNAT*, Period 22, Legislative Year 3 Sessions 112–14; *Official Gazete*, 23 June 2005, Issue 25854.

⁴¹ *Minutes of the GNAT*, Period 22, Legislative Year 4 Sessions 11–14; *Official Gazete*, 9 November 2005, Issue 25988.

CHAPTER 4

Harmonization Packages and Other Legislative Reforms

Between February 2002 and July 2004, the GNAT adopted Nine “harmonization packages,” not counting other major legislative reforms such as the adoption of a new Civil Code, the Criminal Code, the Code of Criminal Procedure, and the Law on Associations. The reason they were commonly called “packages” was that each one of them involved changes in a number of laws. The purpose was to harmonize Turkish legislation with the constitutional amendments of 2001 and 2004, as well as with the *acquis communautaire* as part of Turkey’s efforts to become a full member of the EU. While some of these changes were simple acts of harmonization with constitutional amendments, others were quite important reforms with far-reaching consequences. Three of the packages were adopted during the DLP–NAP–MP coalition, and six during the JDP government. The adoption dates are as follows: First Package (Law No. 4744) 6 February 2002; Second Package (Law No. 4748) 26 March 2002; Third Package (Law No. 4771) 3 August 2002; Fourth Package (Law No. 4783) 2 January 2003; Fifth Package (Law No. 4793) 23 January 2003; Sixth Package (Law No. 4928) 15 July 2003; Seventh Package (Law No. 4963) 30 July 2003; Eighth Package (Law No. 5101) 3 March 2004; Ninth Package (Law No. 5218) 14 July 2004. The most important changes made by the harmonization packages will be dealt with below in a thematical rather than a chronological order.¹

Freedom of Expression

The Progress Reports by the European Commission have constantly underlined the limitations on the freedom of expression in Turkey. The First Harmonization Package introduced relatively minor amendments to the controversial Articles 159 and 312 of the old Turkish

Criminal Code. Article 159 on insulting the state and its institutions was amended to reduce the upper limit of punishment from six years to three years and fines were eliminated. Article 312 which punished inciting people to hostility and hatred on the basis of differences of social class, race, religion, sect, and region was also amended. With the amendment, such expressions would constitute a criminal offense only if they posed a danger to the public order. The new Criminal Code which entered into force on 1 April 2005 (Art. 216) further limited the scope of this offense by using the term "clear and present danger for public safety." Article 159 was amended again by the Third Package adding a paragraph stating that "those written, oral, or visual expressions of thought made with the sole purpose of criticism and without the intention to insult or deride the institutions in question would not constitute a crime." The Seventh Package further reduced the lower limit of the jail term from one year to six months. It has been convincingly argued that Article 159 and the corresponding Article 301 of the new Criminal Code still present major shortcomings since the words "Turkishness" and "Republic" are too broad and vague, and it is not easy to draw the line between insult and derision and legitimate criticism.²

Article 8 of the Anti-Terrorism Act was another major roadblock for the freedom of expression. The article had prohibited written, oral, or visual propaganda as well as meetings, demonstrations, and marches carried out with the purpose of destroying the indivisible integrity of the state with its territory and nation. The First Harmonization Package reduced the jail terms, and the Sixth Package totally abrogated the article, overriding the president's veto. The reform has been praised as "a positive development on its own in terms of ensuring effective protection of free speech."³ The Sixth Package also narrowed down the definition of terror, emphasizing the use of "force and violence" as a necessary element of a terrorist act. Thus, simple exertion of pressure, intimidation, or threat no longer constitutes a terrorist act.

Second, Third and Fourth Packages brought about improvements in the field of freedom of the press. Thus, the confiscation of printed material can only be based on a court order and in urgent cases on a decision of the public prosecutor. In the latter case the public prosecutor's decision must be submitted within 24 hours for the approval of a competent judge. If it is not approved within 48 hours it automa-

tically ceases to be effective. The Fourth Package provided that the owners, general editors, and authors of journals and periodicals cannot be forced to reveal the sources of their news items.

Freedom of Association

The second, third, fourth, and Seventh Packages introduced certain improvements concerning the freedom of association. Notably, the Fourth Package (Art. 34) permitted associations to engage in international activities and collaboration, to establish branches abroad, or to become members in associations established abroad. Similarly, in cases where international cooperation is deemed useful and observing the principle of reciprocity, foreign associations may be permitted to engage in activities and collaboration, establish branches, and join other associations in Turkey by a decision of the Ministry of Interior upon the advice of the Ministry of Foreign Affairs (Art. 35).

More recently, in July 2004, the GNAT passed an entirely new law on associations (Law No. 5231). This law has rightly been characterized by a leading Turkish NGO (the Third Sector Foundation of Turkey, TÜSEV) as the most liberal law on associations in over 20 years. Some of the major revisions include the following: (1) associations are no longer required to obtain prior authorization for foreign funding, partnerships, or activities; (2) associations are no longer required to inform local government officials of the day/time/ location of general assembly meetings and no longer required to invite a government official to general assembly meetings; (3) audit officials must give 24 hour notice and just cause for random audits; (4) NGO's are permitted to open representative offices for federations and confederations abroad; (5) security forces are no longer allowed on premises of associations without a court order; (6) specific provisions and restrictions for student associations have been entirely removed; (7) children from the age of 15 can form associations; (8) internal audit standards have been strengthened to ensure accountability of members and management; (9) NGOs are able to form temporary platforms/initiatives to pursue common objectives; (10) government funding for up to 50 percent of NGO projects is possible; (11) NGOs will be allowed to buy and sell necessary immovable assets.

Freedom of Assembly

The Seventh Harmonization Package limited the power of provincial governors to postpone or ban meetings and demonstration marches. Thus, the period of postponement is reduced from two to one month, and a meeting can be banned only if there is a clear and present danger of a crime being committed (Art. 20). Similarly, a governor can ban all meetings in his province for one month only in case of a clear and present danger for a crime being committed (Art. 22). The Third Package permits foreigners to hold meetings and demonstrations with the permission of the Ministry of Interior.

Freedom of Religion

The Third Package enables the community trusts (meaning non-Muslim charitable trusts) to acquire and dispose of real property with the permission of the Council of Ministers. They can also acquire real property by way of gift or bequest (Art. 4). The Fourth Package confirmed this right, substituting the permission of the General Directorate of Foundations for the permission of the Council of Ministers (Art. 3). The Sixth Package recognized the right of non-Muslim communities to build places of worship subject to the permission of competent administrative authorities (Art. 9).

The Abolition of the Death Penalty

It will be recalled that the death penalty was first restricted by the constitutional amendment of 2001, and then completely abolished in 2004. The Ninth Harmonization Package removed all references to death penalty in the Criminal Code and other criminal legislation.

Prevention of Torture and Mistreatment

The progress reports of the European Commission, as well as the reports of the European Committee for the Prevention of Torture and many international NGOs, have stressed the widespread incidence of torture and mistreatment in Turkey. Therefore, certain reforms were made to deter such practices. The Second Package changed the Civil Servants Law stipulating that damages paid by Turkey as a result of

the decisions of the ECtHR in torture and mistreatment cases shall be claimed from the perpetrators. The Fourth Package abolished the requirement to obtain the permission of the competent administrative authorities in order to prosecute public servants and other public employees in torture and mistreatment cases. Thus, public prosecutors can now directly prosecute the perpetrators. The Seventh Package provided for a procedure of speedy trial in torture and mistreatment cases stipulating that such cases shall be given priority and trials shall continue during the judicial recess. Simultaneously, in July 2004, the GNAT passed a law (Law No. 5233) which provided for the payment of damages by the state incurred as a result of terrorist actions or of the anti-terror activities of government officials.

Minority Rights

The Third Package brought about an almost revolutionary change in Turkish law and mentality by permitting the use of local languages other than Turkish (the exact wording of the Law is “different languages and dialects traditionally used by Turkish citizens in their daily lives”) in radio and television broadcasting. The Sixth Package broadened this right by permitting such broadcasting both by public and private radio and television channels. The Third Package also permitted the setting up of private courses for the teaching of such languages.

International Protection of Human Rights

In the Third Package, the decisions of the ECtHR which found Turkey in violation of the Convention were recognized as grounds for a renewal of trials in civil and criminal courts. Such a request can be made in cases where payment of just satisfaction would not redress the consequences, within one year of the final judgement of the ECtHR, to the presidency of the Court of Cassation by the Minister of Justice, the Public Prosecutor of the Court of Cassation, or the applicant to the ECtHR. The decision for a retrial is made by the competent Plenary session (civil or criminal) of the Court of Cassation. According to the Fifth Package, decisions for a retrial are to be made by the competent civil or criminal court which had rendered the original verdict. The Sixth Package (Art. 6) extended this right to administrative cases.

Civil–Military Relations

In addition to the constitutional amendments of 2001 concerning civil–military relations, the Seventh Package introduced a number of important reforms regarding the structure and functions of the National Security Council, as well as certain other aspects of civil–military relations. Under Article 24 of the Law, the Prime Minister may empower one of the Deputy Prime Ministers to submit the Council's advisory decisions and opinions to the Council of Ministers and to secure the coordination of their implementation in case they are approved by the Council of Ministers (a function which formerly belonged to the Secretary General of the National Security Council). Under Article 25, the National Security Council shall meet every two months instead of once every month. Article 26 divests the Secretary General of the Council from most of his executive powers and limits them essentially to secretarial duties. Article 27 amends the provision requiring the appointment of the Secretary General from among high-ranking military officers; now, the Secretary General can be appointed either from among high-ranking military officers or from among high-level civilian bureaucrats. Since August 2004, this position has been filled by a former diplomat. Article 28 stipulates that the regulation on the functions of the Secretariat of the Council shall be published in the Official Gazette, thus abolishing the secrecy clause and enhancing the transparency of the Secretariat's activities.

The Seventh Harmonization Package also makes it possible for the Court of Accounts to exercise financial supervision on state properties in the hands of the armed forces. The way in which such control is carried out shall be determined by a secret regulation to be prepared by the Ministry of National Defense and adopted by the Council of Ministers. This reform is also confirmed by the constitutional amendment of 2004 which repealed the last paragraph of Article 160 that had given the legislature the possibility to exclude the armed forces from the review of the Court of Accounts.

Finally, the Seventh Harmonization Package (Art. 6) stipulated that crimes regulated by Article 58 of the Military Criminal Code, committed by non-military persons in times of peace, shall not be tried by military courts.

Notes

- ¹ For an overview of the harmonization packages, see: Esin Özü, “Seven Packages towards Harmonisation with the European Union,” *European Public Law*, Vol. 10, No. 4 (2004), 603–21; Ergun Özbudun and Serap Yazıcı, *Democratization Reforms in Turkey, 1993–2004* (İstanbul TESEV, 2004). See also: Pınar Tanlak, “Turkey EU Relations in the Post Helsinki Phase and the EU Harmonization Laws Adopted by the Turkish Grand National Assembly in August 2002,” Sussex European Institute Working Papers No. 55 (2002); Senem Aydın and E. Fuat Keyman, “European Integration and the Transformation of Turkish Democracy,” Centre for European Policy Studies, EU–Turkey Working Papers, No. 2 (August 2004); and Gamze Avcı, “Turkey’s EU Politics: What Justifies Reform?” in Helen Sjursen, ed., *Enlargement in Perspective* (Oslo: ARENA, 2005), 129–50. For the summary of harmonization laws, see: <http://www.byegm.gov.tr/on-sayfa/uyum/uyum-ingilizce.htm>; <http://www.byegm.gov.tr/on-sayfa/uyum/uyum-ingilizce-58hukumet.htm> and <http://www.byegm.gov.tr/on-sayfa/uyum/uyum-ingilizce-59hukumet.htm>.
- ² Levent Gönenç, “Recent Developments in the Field of Freedom of Expression in Turkey,” *European Public Law*, Vol. 11, No. 2 (June 2005), 251–55.
- ³ Gönenç, “Recent Developments,” 249.

CHAPTER 5

EU Conditionality and Democratization Process in Turkey

History of Turkey–EU Relations¹

In the nineteenth century, the basic conceptualizing of the Turks concerning state, society, nature, and human beings radically changed. The Ottoman statesmen and intelligentsia recognized the European supremacy in every field of life, and the Turkish avocation of Europeanization/Westernization had already started. The attempts at Europeanization/Westernization of the country were intensified under Mustafa Kemal Atatürk and his friends after they created the modern Republic of Turkey out of the ruins of the Ottoman Empire.

Without doubt, Turkey will have reached the zenith of Europeanization when it is incorporated by the European states and attains EU membership. Turkey, for at least 200 years, has tried to be seen as “European.” Its relationship with the EU started on 31 July 1959 when Turkey officially applied for an association agreement with the European Economic Community (EEC), which was based upon the Greek application for an association agreement with the EEC on 1 January 1959. On 12 September 1963 Turkey concluded the Association Agreement with the Community, which came into effect on 1 December 1964. The 1963 Ankara Agreement and the Additional Protocol, signed on 23 November 1970, have constituted the basis of Turkish relations with the Community, whereby the 1995 Customs Union was effected. This goal became more apparent when the country applied for EU membership in 1987. However, since 1987, the EU has always been reluctant to accept Turkey as natural part of Europe. Thus, the EU rejected Turkey’s application in 1989 on the ground that Turkey was not ready for membership for political and economic reasons. Even when the Customs Union was being forged between the EU and Turkey in 1995, the anti-democratic policies of the Turkish state and human rights violations were cited as the basic

obstacle in the way. Once again Turkey did not receive candidacy in the 1997 Luxemburg Summit. The Union argued that democracy in Turkey was not mature enough to meet the Copenhagen political criteria. However, the 1999 Helsinki Summit was the real turning point in the relationship. Turkey was eventually officially cited as a candidate for EU membership. The political and state elites, and even the people, in Turkey have clearly understood that Turkey must consolidate its democracy and stop human rights violations in order to enter the Union.

As far as Turkey's candidacy for the EU membership is concerned, Turkey's relationship with the EU in terms of human rights and democratization can be divided into three main periods. The first covers the period when Turkey formally applied for membership on 14 April 1987 and the political developments that took place subsequent to the application. This period practically ended when Ankara understood that full membership would not be attainable in the foreseeable future, having received a rebuff from the Community. The second period covers Turkey's efforts to materialize a customs union with the Union. Thus, it especially involves Ankara's attempts in 1994 and 1995. The last period encompasses the developments that have taken place between the 1997 Luxemburg Council and the 1999 Helsinki Council, and especially post-Helsinki developments.

It can be argued that the EU had a passive leverage until the Helsinki Summit through Europe's magnetic power and association with wealth, modernity, and security. Before the Helsinki Summit, although major democratizing reforms fulfilled after 1987 are fundamentally related to the EU's democratic conditionality, it is also possible to argue that the EU's influence on Turkish democracy had not been as strong as its influence over the CEEC's, basically because the EU had not provided prospects of full membership.

The decisions taken at the European Council in Helsinki (10–11 December 1999) were a very significant watershed in EU–Turkey relations. It would not be an exaggeration to argue that the decisions taken at the Helsinki Summit represented a paradigmatic shift in EU–Turkey relations because, for the first time, the EU clearly stated that Turkey could be an EU member as long as Turkey complied with the Copenhagen political criteria.

Since the 1999 Helsinki Summit, since the EU has given a potential membership option to Turkey, we can talk about the active lever-

age of the Union. The Turkish political elite tried to comply with what the EU had required in the progress reports and other documents prepared by the EU Commission and Parliament, in other words, to meet the requirements of the Copenhagen political criteria.

The Copenhagen Council of 1993 established four criteria for membership of an enlarged EU in the Presidency Conclusions:²

Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate's ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union.

These criteria, which were originally set for the CEECs who had an association agreement with the EU, became an integral part of the Treaty of Europe by the adoption of the Amsterdam Treaty on 1 May 1999. According to Article 6 (1) of the Treaty, "the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States." And any European State which respects the principles set out in Article 6 (1) may apply to become a member of the Union. In other words, while the Copenhagen political criteria indicated the commencement of the membership process for the earlier candidates, Turkey and new candidate states were required to fulfill these criteria *before* beginning negotiations for membership.

Conditionality and Compliance with the EU Acquis: Progress Reports and Legislative Reforms in Turkey

In June 1998 the European Council in Cardiff noted that the Commission would present a report on Turkey based on the Article 28 of the Association Agreement and the conclusions of the Luxembourg European Council. Starting in 1998 the EU Commission prepared regular annual reports on Turkey's progress towards accession. The 1998 Progress Report underlined the following problems areas:³

- Persistent human rights violations.
- *De jure* and *de facto* difference in the treatment accorded to minorities officially recognised under the Lausanne Treaty and those outside its scope.
- Recognition of Kurds as a minority.
- Lack of civilian control of the army, and its influence in political life through the National Security Council.
- State security courts which are not compatible with a democratic system and run counter to the principles of the European Convention of Human Rights.
- Ratification of the International Covenant for Civil and Political Rights.
- Abolition of the death penalty.
- Ratification of the Framework Convention for the Protection of National Minorities.
- Restrictions on the freedom of expression.
- Limitations on the freedom of association.
- Impunity for law enforcement officials.
- Bans on the usage of the Kurdish language in “political communication” or education and broadcasting.
- Bureaucratic restrictions on the freedom of religion for religions and sects other than Sunni Islam.

Turkey responded to this Report with several positive steps. In January 1999, the Constitutional Court annulled a legal provision, which empowered security officers to “fire directly and without hesitation at persons who do not stop when warned.” In August 1999 the Parliament adopted a law amending Articles 243, 245, and 354 of the Penal Code. This law redefined torture, ill treatment, and abuse of power against individuals by public officials and provided for future higher penalties for public officials who commit such offences, or medical personnel who draft fake reports on torture. In September 1999, a law postponing prosecutions and punishment for offences committed through the press and broadcasting was approved. In December 1999, the authorities issued a circular according to which religious communities would not have to seek permission from the state in order to restore the buildings of charitable institutions and places of worship.

Obviously, the EU's formal recognition of Turkey as a candidate state and her inclusion in EU programs at the Helsinki Summit on 10 and 11 December 1999 was conducive to more progress towards democracy in Turkey.⁴

Thus, the Commission's assessment on progress in Turkey encouraged her to continue her efforts to comply with the accession criteria. The Commission's 1999 Regular Report on Turkey's progress towards accession reaffirmed, however, that negotiations would not start until the political criteria were met. The Report listed a number of problem areas to be reformed:⁵

- The place and importance of the National Security Council in political life.
- Ratification of a number of important Human Rights Conventions.
- Incidence of extra-judicial executions and torture.
- Limitations on the freedom of association and the freedom of assembly.
- Differences of treatment between the religious minorities recognised by the Lausanne Treaty and other religious minorities.
- Abolition of the death penalty.
- "A civil solution including recognition of certain forms of Kurdish cultural identity and greater tolerance of the ways of expressing that identity, provided it does not advocate separatism or terrorism."
- Ratification of the Framework Convention on the Protection of National Minorities and the European Charter for Regional or Minority Languages, as well as the Assembly Recommendation 1201 (1993), on an additional protocol on the rights of national minorities to the European Convention of Human Rights.

Turkey signed two major international instruments in the field of human rights, namely, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights in August 2000. Human rights education has been incorporated in the curricula of police academies since the beginning of the 1999–2000 academic year. On 31 March 2000 the Court of Cassation confirmed the freedom of individuals under the Civil Code to give their children any names of their choosing, including Kurdish ones.

The Commission's 2000 Regular Report on Turkey's progress towards accession states that the basic features of a democratic system continue to exist, but that Turkey was slow in implementing the institutional reforms needed to guarantee democracy and the rule of law:

A positive development since the last regular report is the launching in Turkish society of a wide-ranging debate on the political reforms necessary with a view to accession to the EU. Two important initiatives have been taken in this context: the signing of several international human rights instruments and the recent endorsement by the government of the work of the Supreme Board of Co-ordination for Human Rights.⁶

However, compliance with the Copenhagen political criteria was a prerequisite for the opening of accession negotiations. So far, the Commission's Report argued, Turkey had not fulfilled these political criteria:

Changes in the executive have taken place with respect to EU-Turkey relations but a number of basic institutional issues, such as civilian control over the military, remain to be addressed... The important draft laws related to the functioning of the judiciary referred to in last year's regular report are still pending. No further improvement has taken place concerning the State Security Courts since the last reform of these Courts in June 1999. Corruption remains a matter of concern... The death penalty is not being carried out... but many aspects of the overall human rights situation remain worrying. Torture and ill treatment are far from being eradicated, even though the matter is taken seriously by the authorities and the parliament and training programs on human rights are being implemented... Freedom of expression as well as freedom of association and assembly are still regularly restricted.

The Report also underlined a large number of priority areas for accession.⁷

The main purpose of the Accession Partnership Document, which was adopted in March 2001 by the Council, "is to set out in a single framework the priority areas for further work identified in the European Commission's 2000 Regular Report on the progress made by Turkey towards membership."⁸ The Accession Partnership document is the most important medium of the pre-accession strategy and the first concrete step that integrates Turkey into the enlargement process. It lays down the objectives that have to be achieved in short and medi-

um terms and frames the financial aid that will be given by the EU. The Accession partnership Document for Turkey was accepted by the Commission on 8 March 2001.⁹ Except for the “Cyprus issue” and “border disputes,” items which were included under the title of political criteria, the Commission emphasized “enhanced political dialogue” and mainly the following political criteria in the short term:

- Strengthening the legal and constitutional guarantees for the right to freedom of expression in line with Article 10 of the European Convention of Human Rights.
- Strengthening the legal and constitutional guarantees of the right to freedom of association and peaceful assembly, and encouraging the development of civil society.
- Strengthening the legal provisions and undertaking all necessary measures to reinforce the fight against torture practices, and ensuring compliance with the European Convention for the Prevention of Torture.

and for medium-term:

- Guaranteeing the full enjoyment by all individuals, without any discrimination and irrespective of their language, race, colour, sex, political opinion, philosophical belief, or religion, of all human rights and fundamental freedoms.
- Further developing the conditions for the enjoyment of freedom of thought, conscience, and religion.
- Reviewing of the Turkish Constitution and other relevant legislation with a view to guaranteeing rights and freedoms of all Turkish citizens as set forth in the European Convention for the Protection of Human Rights; ensuring the implementation of such legal reforms and conformity with practices in EU Member States.
- Abolishing the death penalty, signing and ratifying Protocol No. 6 of the European Convention of Human Rights.
- Ratifying the International Covenant on Civil and Political Rights and its optional Protocol and the International Covenant on Economic, Social, and Cultural Rights.

Following the adoption of the framework regulation for the Accession Partnership by the General Affairs Council and approval of the

Accession Partnership by the Council in February 2001, the Turkish Government announced her National Program for the Adoption of the EU *Acquis* on 19 March 2001. The Program promised to take necessary measures for the effective implementation of the universal norms set by the EU *acquis* and practices in EU member states, giving priority to constitutional amendments,¹⁰ and such amendments were passed by the GNAT in 2001, as was analyzed above. Thus, the Commission, in its 2001 Regular Report, expressed satisfaction with the constitutional reforms:¹¹

The constitutional amendments adopted by the Turkish Parliament on 3 October 2001 are a significant step towards strengthening guarantees in the field of human rights and fundamental freedoms and limiting capital punishment. The amendments narrow the grounds for limiting such fundamental freedoms as the freedom of expression and dissemination of thought, freedom of the press and freedom of association. Attention has now turned to the effective implementation of these important changes. The Turkish Government is finalizing a package of new draft legislation that is aimed at implementing a number of constitutional amendments, in particular with regard to freedom of expression and thought. It should facilitate progress towards satisfying the Accession Partnership priorities.

The Report also emphasized that Turkey made some progress in relation to priorities described by the Accession Partnership Document and the Turkish National Program for the Adoption of the *Acquis* (NPAA) as follows:¹²

On *pre-trial detention*, the amendment of Article 19 of the Constitution reduces to four days the period of police custody before bringing the person detained before a judge in cases of collective offences. This is a positive development from the point of view of the prevention of ill treatment of detainees and should be applied also for offences falling under the competence of the State Security courts and in state of emergency provinces.

Numerous *training courses in human rights* have taken place for judges and law enforcement officials but it is too early to evaluate their impact.

A limited number of initiatives were taken to strengthen the *efficiency of the judiciary*, such as the establishment of criminal enforcement judges as a new judicial function and the setting-up of special sections in the judiciary specialising in intellectual property rights and consumer protection.

The *de facto moratorium on capital punishment* has been maintained.

The 2001 Regular Report warned, however, that the NPAA falls considerably short of the Accession Partnership priority of guaranteeing cultural rights for all citizens irrespective of origin. Furthermore, the priority on the removal of all legal provisions forbidding the use by Turkish citizens of their mother tongue in TV/radio broadcasting is to be included. With respect to the death penalty, a commitment in the NPAA to sign Protocol 6 of the ECHR is lacking. The document should specify how Turkey intends to guarantee freedom of religion, in particular with respect to minority religions not covered by the Lausanne Treaty (Muslim and non-Muslim communities).¹³ The Report further underlined the priority areas to be reformed.

Late 2001 and early 2002 witnessed a series of legal reforms in Turkey. The constitutional amendments of October 2001 led to the adoption of three packages of implementing or harmonization legislation in 2002, as described above. Meanwhile a new Civil Code was adopted in November 2001. Taken together, these reforms provide much of the ground work for strengthening democracy and the protection of human rights in Turkey, and they were, on the whole, positively evaluated by the 2002 Regular Progress Report. The Report indicated, on the other hand, that further legislative changes were needed in such areas as freedom of expression, freedom of peaceful assembly, freedom of association, the right to legal redress, cultural and educational rights. Also underlined was the need for a "sustained effort in terms of implementation and actual improvement of the situation on the ground."¹⁴

Later, in the Copenhagen presidency conclusions of 12 and 13 December 2002 it was recalled that Turkey was a candidate state and the Council welcomed the important steps taken by Turkey in meeting the Copenhagen political criteria, and gave the date, December 2004, for opening accession negotiations with Turkey. This summit had a special importance for Turkey's position as it gave a concrete date for the opening of accession negotiations.¹⁵

Meanwhile, the new single party government formed by the JDP following the elections of 3 November 2002 strongly endorsed the EU objective, and issued a new and revised "National Program" indicating political, economic, and social criteria in order for member-

ship talks to begin in early 2005. In line with the revised Accession Partnership which was adopted by the Council in May 2003¹⁶ the political criteria section of the 2003 NPAA underlined the following major objectives:¹⁷

- The Government is resolved to complete legislative measures relevant to the Copenhagen political criteria within the 1st legislative year of the 22nd legislative session of the Turkish Grand National Assembly.
- The complete redrafting of all basic legislation is a long-term legislative process, which will also continue during the accession negotiations. The Government has opted to accelerate the harmonization of various laws in order to fulfill the political criteria, the prerequisite to the opening of accession negotiations, through “harmonization legislation packages.” However, the ultimate long-term aim is to renew basic legislation through an integrated approach.
- The Government attaches importance and priority to both the continuation and the expansion of freedom of expression. Support for the development of civil society and its participation in democratic life will be continued. In this vein, the relevant legislation will continue to be reviewed in the light of the European Convention of Human Rights. Torture and maltreatment will be prevented and zero tolerance will be shown in this matter. The legislative and administrative measures adopted for this purpose will be implemented strictly. Human rights training for public officials will be expanded and intensified. Legal reforms will be emphasized as the basis of the democratization process. The effective implementation of the measures concerning the conditions in prisons and detention houses will be achieved.
- The Government is convinced that ensuring the full and equal enjoyment of all fundamental rights and freedoms and cultural rights by all individuals without discrimination is its fundamental duty. In this context, the freedoms of thought, conscience, religion, and belief will be strictly safeguarded in accordance with Article 9 of the ECHR. The legislation concerning freedom of worship will be simplified in implementation in light of the ECHR and its Additional Protocol No. 1, with a view to addressing the needs of different religions and faiths. Ensuring gender equality in practice will be prioritized. The implementation of the provisions on the learning of and the broadcasting in different languages and dialects used by Turkish citizens in their daily lives will be ensured.
- The functions of the National Security Council and the Secretariat-General of the National Security Council shall be harmonized with the consultative status as redefined through constitutional and legislative amendments.

The 2003 Regular Report evaluated the progress in relation to priorities set out in the revised Accession Partnership document and the 2003 NPAA as follows:¹⁸

Turkey has begun to address the priorities defined by the revised Accession Partnership. Overall, progress has been made, but substantial efforts are still necessary to complete the tasks foreseen for the period 2003–2004. For a considerable number of these priorities, the government will benefit from EU assistance, as projects directly related to these priorities have been included in the 2003 national program.

With regard to short-term priorities concerning the enhanced political dialogue and political criteria, significant progress has been made in meeting the priorities. In particular, there has been a sustained legislative effort aiming at bringing the relevant legislation in line with the EU standards. In some areas, there is a need for additional legislative efforts. Overall, implementation on the ground is uneven and the concrete results of the reforms remain to be seen.

The Report also underlined the areas of further needed reforms.

The Turkish side responded to the Report by passing four reform (or harmonization) packages in 2003 (Laws No. 4778, 4793, 4928, and 4963) as analyzed above. Furthermore, the parliament ratified several international and European conventions such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, Protocol No. 6 to the ECHR, and the Civil Law Convention on Corruption.

As indicated in the 2004 Regular Report,¹⁹ Turkey achieved significant legislative progress in many areas, through further reform packages in 2004, and particularly through the important constitutional amendments of 2004, as analyzed above. Furthermore, Turkey signed or ratified several international conventions including the Protocol No. 13 to the ECHR, concerning the abolition of the death penalty in all circumstances, the First Optional Protocol to the International Covenant on Civil and Political Rights, providing for recourse procedures that extend the right of petition to individuals, the Second Optional Protocol on the abolition of the death penalty, and the Optional Protocol to the Convention on the Rights of the Child and on the Involvement of Children in Armed Conflict.

Thus, the European Commission concluded that:

Turkey has substantially progressed in its political reform process, in particular by means of far reaching constitutional and legislative changes adopted over the last years, in line with the priorities set out in the Accession Partnership. In view of the overall progress of reforms attained and provided that Turkey brings into force the outstanding legislation..., the Commission considers that Turkey sufficiently fulfils the political criteria and recommends that accession negotiations be opened.²⁰

The 2004 Report also stated in its “Global Assessment on Accession Partnership”:²¹

Significant progress has been achieved in aligning the overall framework for the exercise of *fundamental freedoms* with European standards. The principle of *equality of men and women* has been strengthened and provisions allowing reduced sentences for so-called “honor killings” have been removed. A new penal code introduces further alignment in particular in relation to women’s rights, non-discrimination and the fight against torture and ill-treatment.

...

Nonetheless, on the ground, *detainees* are still not always made aware of their rights by the law enforcement bodies and prosecutors are not always promptly and adequately conducting investigations against public officials accused of torture. Continued efforts will be necessary to eradicate these methods, including the consistent imposition of appropriate sanctions on the perpetrators of torture and ill-treatment.

...

The situation of people sentenced for *nonviolent expression of opinion* is now being addressed in line with the repeal or amendment of certain legislation. Retrials have taken place in line with ECtHR judgements and several persons sentenced under the old provisions were either acquitted or released. However, provisions enabling retrial still do not apply to all relevant ECtHR judgements.

...

While *freedom of religious belief* is guaranteed in the Constitution, non-Muslim religious communities continue to experience serious problems, including difficulties connected with legal personality, property rights, training of clergy, schools and internal management, which could be remedied through the adoption of appropriate legislation. Alevis are still not recognised as a Muslim minority.

...

There has been progress in the implementation of reforms concerning *cultural rights*. Kurdish language classes recently began in

several private language schools in the Southeast of Turkey. Broadcasting in Kurdish and other languages and dialects other than Turkish is now permitted, if under restrictive conditions, and such broadcasts have started... In this regard, Turkey's reservations to UN human rights covenants on the right to education and protection of minorities are of concern.

...

Budgetary transparency has been enhanced. The Court of Auditors was granted permission to audit military and defence expenditures. Extra-budgetary funds have been included in the general budget allowing for full parliamentary control. For the first time, a civilian has been appointed to the position of Secretary General of the *National Security Council* in August 2004. However, the armed forces continue to exercise influence through informal mechanisms.

...

The government undertook major steps to achieve better implementation of the reforms. The Reform Monitoring Group, a body set up under the chairmanship of the deputy Prime Minister responsible for Human Rights, was established to supervise the reforms across the board and to solve practical problems. Significant progress took place also on the ground; however, the implementation of reforms remains uneven.

In addition, it was stated that the situation of gypsies, the ratification of the Council of Europe Framework Convention for the Protection of National Minorities, the European Charter for Regional and Minority Languages, and the Additional Protocol No. 12 to the ECHR on the general prohibition of discrimination by public authorities would be considered as priorities.

It was stated in the Presidency conclusions of 16 and 17 December 2004 that Turkey made decisive progress in its far-reaching reform process and confidence was expressed that Turkey will sustain that process of reform:²²

Turkey sufficiently fulfills the Copenhagen political criteria to open accession negotiations provided that it brings into force these specific pieces of legislation. It invited the Commission to present to the Council a proposal for a framework for negotiations with Turkey, on the basis set out in paragraph 23. It requested the Council to agree on that framework with a view to opening negotiations on 3 October 2005.

A full analysis of all aspects and dynamics of Turkey–EU relations and their impact on domestic Turkish politics is clearly beyond the

scope of this work. It has been convincingly argued that at present the main cleavage in Turkish politics is between the “conservative globalists” and the “defensive nationalists.”²³ It remains a fact, however, that successive Turkish governments in the last twenty years have determinedly pursued policies that aim at Turkey’s accession to the EU, and despite the ups and downs in the process, a majority of the Turkish public still supports EU membership. The foregoing analysis clearly suggests that the prospect of such membership has been a strong driving force in the liberalization and democratization process in Turkey.²⁴ One should not lose sight of the fact, however, that the constitutional and legal reforms in the last decade or so also correspond to Turkish society’s strong desire for a more liberal and democratic political system.

Notes

- ¹ On Turkey's relation with the EU, see: Canan Balkır and Allen Williams, eds., *Turkey and Europe* (London: Pinter Publishers, 1993); Meltem Müftüler-Baç, *Turkey's Relations with a Changing Europe* (Manchester: Manchester University Press, 1997); Meltem Müftüler-Baç, *Enlarging the European Union: Where does Turkey Stand?* (İstanbul: TESEV Publications, 2002); Harun Arıkan, *Turkey and EU: An Awkward Candidate for EU Membership?* (Aldershot: Ashgate, 2003); and Ali Çarkoğlu and Barry Rubin, eds., *Turkey and the European Union: Domestic Politics, Economic Integration, and International Dynamics* (London: Frank Cass, 2005).
- ² For the Copenhagen 1993 Presidency Conclusions, see: http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/72921.pdf.
- ³ For the 1998 Progress Report, see: http://europa.eu.int/comm/enlargement/report_11_98/pdf/en/turkey_en.pdf.
- ⁴ For Presidency Conclusions, see: http://www.europarl.eu.int/summits/hell_en.htm.
- ⁵ For 1999 Regular Report, see: http://europa.eu.int/comm/enlargement/report_10_99/pdf/en/turkey_en.pdf.
- ⁶ For 2000 Regular Report, see: http://europa.eu.int/comm/enlargement/report_11_00/pdf/en/turkey_en.pdf.
- ⁷ *Ibid.*, 10–19 and 72–74.
- ⁸ For the Framework Document, see: http://www.un.org.tr/unido/framein-turkey_eu.htm.
- ⁹ For the Accession Document, see: http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_085/l_08520010324en_00130023.pdf.
- ¹⁰ For the text of 2001 National Program, see: <http://europa.eu.int/comm/enlargement/turkey/pdf/summary.pdf>.
- ¹¹ For the 2001 Regular Report, see: http://europa.eu.int/comm/enlargement/report2001/tu_en.pdf, 96.
- ¹² *Ibid.*, 100.
- ¹³ *Ibid.*, 12–30 and 100–4.
- ¹⁴ For the 2002 Progress Report, see: http://europa.eu.int/comm/enlargement/report_2002/tu_en.pdf, 15–42, 137–39, 144–45, 149–50.
- ¹⁵ For the Presidency Conclusions, see: http://ue.eu.int/ueDocs/cms_Data/docs/presData/en/ec/73842.pdf.
- ¹⁶ See also: http://europa.eu.int/comm/enlargement/turkey/pdf/revised_ap_en.pdf.
- ¹⁷ http://www.euturkey.org.tr/abportal/uploads/files/NPAA_executive_summary.doc, for the whole text, see: http://europa.eu.int/comm/enlargement/turkey/pdf/npaa_2003/II-political_criteria_eng_.pdf.
- ¹⁸ For the 2003 Regular Report, see: http://europa.eu.int/comm/enlargement/report_2003/pdf/rr_tk_final.pdf, 44 and 137–38.
- ¹⁹ The 2004 Regular Report, see: http://europa.eu.int/comm/enlargement/report_2004/pdf/rr_tr_2004_en.pdf, 11–44 and 165–74.

²⁰ For the recommendation of the European Commission on Turkey's progress towards accession, see: http://europa.eu.int/comm/enlargement/report_2004/pdf/tr_recommandation_en.pdf.

²¹ *Ibid.*

²² For the Presidency conclusions, see: http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/83201.pdf.

²³ Ziya Öniş, "Conservative Globalists versus Defensive Nationalists: Political Parties and Paradoxes of Europeanization in Turkey," *Journal of Southern Europe and the Balkans*, Vol. 9, No. 3 (December 2007), 247–60.

²⁴ See, for example: Serap Yazıcı, "The Impact of the EU on the Liberalization and Democratization Process of Turkey," in Richard T. Griffiths and Durmuş Özdemir, eds., *Turkey and the EU Enlargement Process of Incorporation* (Istanbul: İstanbul Bilgi University Press, 2004), 101.

CHAPTER 6

The Constitutional Crisis of 2007–2008 and the Search for a New Constitution

The Constitutional Crisis over the Presidency and the Constitutional Amendments of 2007

The search for an entirely new constitution was triggered by the constitutional crisis in the spring of 2007 over the question of the presidency. At the end of President Sezer's term of office, the governing JDP seemed to have enough votes in the parliament to elect its own candidate. Indeed, the Constitution of 1982 (Art. 102) clearly described the procedures for the election of the president, according to which a maximum number of four parliamentary rounds are foreseen for the election. The decisional quorum is two-thirds of the full membership of the Assembly on the first two rounds, and the absolute majority of the full membership on the third and fourth rounds, a minimum of 367 and 276 votes, respectively. The Constitution contains no special quorum rule for the meeting of the Assembly, in which case the general rule in Article 96 should apply, that is, the quorum should be one-third of the full membership (184 votes). The parliamentary arithmetic then gave the JDP the power to elect the president alone on the third or fourth rounds, but not on the first two rounds. Thus, there seemed to be no constitutional obstacle to the election of a JDP candidate.

At this point, maneuverings of dubious legal validity started in order to "save the last citadel of the secular republic" from the occupation of an alleged "Islamist." A retired chief prosecutor of the Republic (Sabih Kanadoğlu) put forward an argument that the two-thirds majority is not only the decisional quorum, but also the necessary quorum for the opening of the session. The main opposition party, the RPP, embraced the argument after hesitating for a few days. The chorus was joined by some constitutional law professors and some members of the media. After the first round on which the two-thirds quorum was not obtained because of the boycott by the opposition deputies, the RPP carried the case to the Constitutional Court,

and the Court, in an extremely controversial ruling rendered on 1 May, endorsed the claim of unconstitutionality.¹ It should be remembered here that just before the Constitutional Court ruling, on 27 April a statement was made public on the internet site of the Chief-of-the-General-Staff office strongly criticizing some allegedly anti-secular local activities, expressing concern over the debates on secularism in connection with presidential elections, and threatening to use its “legal powers” in order to protect the secular republic. At any rate, the ruling of the Constitutional Court put an end to the election process since the required quorum (367 votes) was not obtained on the first round and the JDP’s candidate Abdullah Gül failed to get elected. This deadlock obliged the parliament to call new elections as required by the Constitution. A full analysis of the Constitutional Court’s decision is beyond the scope of this study. It suffices to say here, however, that it is considered inconsistent with the literal, teleological, and historical interpretations of the Constitution by a majority of constitutional law scholars, and described as based on political rather than legal considerations.²

As a result of the deadlock over the presidency, the Assembly decided unanimously to call new elections, and fixed the date at 22 July 2007.³ Simultaneously, the Assembly adopted a constitutional amendment adding the provisional Article 17 to the Constitution which provided that the last paragraph of Article 67 not be applied in the next general elections (Art. 67 provided that changes in electoral laws shall not be applied in elections held within a year from the effective date of the change). Thus a change in the electoral laws was introduced which required the inclusion of independent candidates in the single unified ballot.⁴ The hardly hidden aim of the overwhelmingly approved amendment was to make life difficult for the Kurdish nationalist DSP that intended to put up independent candidates in order to overcome the ten percent national threshold foreseen for political parties. Thus, it was hoped that the largely illiterate voters in the Kurdish-dominated Southeastern region would have difficulty in identifying the names of their candidates in the long unified ballots.

At about the same time, the JDP leadership reacted to the new situation by proposing a constitutional amendment package that involved changes in five articles and the addition of two provisional articles. The proposal involved the shortening of the legislative period from five to four years, the popular election of the President of

the Republic for a maximum of two five-year terms, and an amendment to Article 96 according to which the meeting quorum for the Assembly be one-third of its full membership for all business including elections. The proposal was strongly opposed by the RPP, but supported by the minor opposition party MP. Therefore, all were adopted in the second reading by a more than two-thirds majority. The amendment package was designed with a view to preventing the reoccurrence of the parliamentary deadlock in the election of the president. During the debates, the RPP deputies argued that the real intention of the proposed change was to create a semi-presidential system, since popular elections would increase the political weight of the president already endowed with broad constitutional powers.⁵ Indeed, the establishment of a presidential or semi-presidential system had long been advocated by such center-right leaders as Turgut Özal and Süleyman Demirel.⁶

The amendment bill was returned to the parliament for reconsideration by President Sezer on 25 May 2007. President Sezer argued in his reasoning that changing the method of election of the president is not a simple procedural change, but one directly related to the political system preferred by the Constitution. The present Constitution conceives the presidency as an impartial office, an element of “balance and stability” *vis-à-vis* the power of the majority party. The proposed change means a departure from the parliamentary government system without, however, adopting the main features of a presidential or semi-presidential system; thus, it will be a system “with no example or practice.” President Sezer warned that a popularly elected president will “easily become the dominant element of the political system,” and the system will lead to conflicts and frictions within the executive. He also objected to the nomination of presidential candidates by political parties and the possibility of getting elected for a second five-year term as measures likely to weaken the impartiality of the president and politicize his office. Finally, President Sezer argued that such a fundamental change in the political system should not be introduced in haste without sufficient consideration and deliberation.⁷

Upon reconsideration, the Assembly readopted the amendment bill verbatim. All articles, except Article 1 concerning the shortening of the legislative period from five to four years, were adopted by more than the requisite two-thirds majority (i.e., 367 votes). That Article 1

received only 366 votes led to a procedural debate on the question of the constitutionality of the voting, as will be spelled out below.⁸

This conflict over the constitutionality of the proceedings was carried to the Constitutional Court by President Sezer and the RPP deputies. The claimants argued that, under Article 175 of the Constitution, the required quorum for the bill upon its being returned to the parliament by the president for reconsideration is the two-thirds of its full membership, and that this requirement is valid for every article of the bill, as well as for its whole. Therefore, according to the RPP deputies, the fact that Article 1 of the bill received only 366 votes made the adoption of that Article unconstitutional; it also made the final vote on the whole of the bill (which received 370 votes) unconstitutional since the rejected Article 1 was not dropped from the bill. President Sezer went further, arguing that the adopted bill should be considered “null and void” (in Turkish law it is different from annulability) since the quorum rules for constitutional amendments were not complied with. Both claims were ultimately based on Article 148 of the Constitution which allows the Constitutional Court to review constitutional amendments from a strictly procedural point of view, that is, whether the amendment bill is debated twice and whether the quorum rules for the proposal and adoption of the amendment bill are complied with.

The Constitutional Court rejected the claim of unconstitutionality, however, in its ruling on 5 July 2007. Firstly, the Court rejected the president’s claim of nullity with a nine-to-two vote on the grounds that procedural irregularities alluded to in the Constitution are grounds for annulment, not for nullity. Secondly, the Court, again with a nine-to-two majority, did not find it unconstitutional that in the first reading of the bill a two-thirds majority was not obtained. According to the Court’s reasoning, such an interpretation would make the second reading meaningless. Thirdly, the Court argued that a two-thirds majority is not a constitutional requirement in cases of reconsideration upon the president’s request. According to the Court, the requisite majority is three-fifths of the full membership in all cases, the only difference being that if the bill is readopted by a three-fifths but less than two-thirds majority a referendum is mandatory, while if it is readopted by a two-thirds or stronger majority, referendum is left to the discretion of the president. On this last point, the Court’s ruling was six-to-five.⁹

Meanwhile, President Sezer had already submitted the readopted amendment law (Law No. 5678) to a referendum as he was entitled to under Article 175 of the Constitution. The Law No. 3376 concerning referendums on constitutional amendments (Art. 2) provided for a period of 120 days for the holding of the referendum starting from the publication of the amendment law. The JDP reacted to this new situation by proposing an amendment to the Law No. 3376, shortening the period to 45 days in the hope that the popular election of the president might take place on the same day as the parliamentary elections scheduled on 22 July. The bill was adopted on 1 June,¹⁰ but was also vetoed by the president and since there was no time left for its readoption, the JDP's plans to combine the presidential and parliamentary elections failed.

The parliamentary elections of 22 July gave the JDP a strong mandate with 46.7 percent of the vote and 340 out of 550 seats. One of the first items on the agenda of the newly elected Assembly was to elect a president. However, given the Constitutional Court's decision discussed above, the same problem persisted. The JDP had enough votes to elect its candidate on the third or the fourth rounds, but not on the first two rounds. Since the required quorum for the starting of the first round was the two-thirds majority according to the Constitutional Court's interpretation, the JDP needed to secure the attendance of at least some of the opposition deputies. At this point, the second largest opposition party, the ultra-nationalist NAP, decided to attend the parliamentary sessions in order not to create a second constitutional crisis. The NAP's lead was followed by the Kurdish nationalist DSP as well as the DLP whose deputies were nominated on the RPP lists but resigned from the RPP immediately after the elections. The NAP and the DLP deputies attended the parliamentary sessions, but voted for their own candidates, Sabahattin Çakmakoglu and Hüseyin Tayfun İçli, respectively. On the third round held on 28 August, Abdullah Gül was duly elected the eleventh President of the Republic with 339 votes out of a total of 448.¹¹

There remained one unresolved constitutional problem, however. Article 6 of the constitutional amendment law added two provisional articles to the Constitution. According to Provisional Article 19, "the first round of the election of the eleventh President of the Republic shall be held on the first Sunday following the fortieth day from the publication of this Law in the Official Gazette, and the second round

on the second Sunday following the first round.” However, the eleventh president had already been duly elected by the Assembly on August 28. Thus, the Provisional Article 19 seemed to have lost its applicability. Nevertheless, to avoid another constitutional controversy and a possible crisis, the JDP deputies proposed a new constitutional amendment to delete the provisional Articles 18 and 19 from the text submitted to the referendum. The amendment bill was debated on 10 and 16 October, during which the RPP deputies argued that the substance of the text submitted to referendum could not be changed after the referendum process had started (indeed, voting by Turkish citizens resident abroad at the points of entry into Turkey had already started in accordance with Article 94 of the Law on the Basic Provisions on Elections and Electoral Registers), and that no change could be made on a text which had not entered into effect, and described the process as a “legal and political scandal.” The RPP spokesman proposed that the entire bill submitted to referendum be withdrawn. Once again, however, the NAP deputies supported the amendment in order to avoid a constitutional crisis, and the bill was adopted by a more than two-thirds majority (in the second reading, Article 1 by 395 votes to 104, Article 2 by 391 votes to 101, Article 3 by 396 votes to 91, and the whole bill by 386 to 87 votes).¹²

On 21 October the constitutional amendment Law No. 5678 was adopted by referendum with a 68.95 percent majority with a turnout rate of 67.51 percent.¹³ Thus, the long drawn-out constitutional battle over the question of the presidency seemed to be finally over. But not quite. The RPP took the last (16 October) amendment to the Constitutional Court, and the Court rejected it since the claim was not related to the procedural irregularities referred to by the Constitution, that is, whether the amendment proposal was debated twice, and whether the quorum rules on the proposal and adoption of the bill were complied with.¹⁴ Similarly, the RPP’s claim for the cancellation of the 21 October referendum was rejected by the Supreme Board of Election.

The year 2007 can indeed be characterized as a period of a series of “constitutional battles.”¹⁵ The bitterness and intensity of these battles can only be understood in terms of the peculiarities of Turkish politics. As was alluded to in Chapter 1, the secularist state elites who have always enjoyed a controlling influence on Turkish politics see the presidency as their undisputable domain and as a guarantee against anti-secular tendencies. The broad powers granted to it by

the 1982 Constitution makes it a particularly important prize in political competition. The secularist camp often expresses the fear that an Islamist president could gradually Islamize the Constitutional Court, the judiciary, and the universities through his broad appointive powers. This fear is more dramatically expressed in the often-heard slogan that the presidency is the last citadel of the secular Republic which should not be surrendered to an Islamist at all costs. The secularists' and the 1982 Constitution's conception of the presidency is an office of tutelage or a mechanism of checks and balances over elected politicians on behalf of the state elites.¹⁶ President Sezer performed this function admirably well. The anti-JDP allies in the constitutional battles of 2007 were the president, the military, the Constitutional Court, the RPP, and about one-fourth of the Turkish public who think that secularism is under threat. Thus, a recent public opinion survey showed that while the percentage of those supporting a *sharia*-based state was only 8.9 in 2006 (down from 21 percent in 1999) 22 percent of the respondents thought that Islamic fundamentalism had risen in the last 10–15 years. Even larger segments of the public are of the opinion that the JDP seeks to infiltrate the public bureaucracy with Islamist cadres (43.8%), intends to establish an "Islamic way of life" (50.2%), and aims at reversing the accomplishments of the Republic in the field of women's rights (36.7%). Furthermore, the perception of threat to secularism correlates positively with the level of income and education (high SES).¹⁷ These findings suggest that opposition to the JDP government on the basis of the secularism issue is particularly strong in the strategically located sectors of society, namely the state elites and the better-educated, high-income groups, even though such concerns are not shared by a majority of the population. Hence the bitterness of the opposition to Abdullah Gül's election as the President of the Republic. The same opposition is also evident in the reaction shown to the JDP's initiative for a new constitution.

The JDP's Initiative for a New Constitution

The JDP's 2007 election manifesto contains a strong promise for a new constitution which is described as "civilian" and as a "social contract." It should protect fundamental rights and liberties in the most effective way in accordance with the standards of the Universal Declaration of Human Rights and ECHR, while preserving the una-

mendable characteristics of the republic such as the democratic, secular, and social state based on human rights and the rule of law. The manifesto promises to regulate the relations among different branches of government in line with the parliamentary model and to redefine the powers of the president accordingly. The new constitution should be based on the broadest possible consensus.¹⁸

The JDP started to work on the new constitution even before the 22 July 2007 elections. On 8 June, Prime Minister Erdoğan asked a group of constitutional law professors to prepare a draft constitution within the parameters in the party's election manifesto.¹⁹ The drafting committee presented its draft to the JDP leadership on 29 August 2007, and on 14–16 September a joint meeting between the committee members and eleven leading JDP ministers and parliamentarians took place in Sapanca, where some minor modifications were made on the draft. Some of the main novelties proposed by the draft are as follows:

- (a) Standards for fundamental rights and liberties are improved in the light of the European Convention of Human Rights. The Constitutional Court is empowered to annul a law that conflicts with an international human rights treaty of which Turkey is a party. Political rights are broadened by making the prohibition of political parties more difficult and abolishing the five-year political ban for individual party members resulting from the closure of their party. New rights are added such as the right to receive information, children's rights, the right to a fair trial, and the right to the protection of personal data. The provision on equality is amended to allow positive discrimination (affirmative action) for women and the other disadvantaged groups. Religious education that was made compulsory by the 1982 Constitution is made optional. The protection of human dignity is emphasized as one of the fundamental duties of the state both in the Preamble and in the text.
- (b) The principle of the rule of law is bolstered by removing certain restrictions on judicial review, such as on the decisions of the Supreme Council of Judges and Public Prosecutors, of the Supreme Military Council, and the decree-laws passed during martial law and the state of emergency.
- (c) The democratic legitimacy of the Constitutional Court and the Supreme Council of Judges and Public Prosecutors is streng-

thened by allowing the parliament to elect some of their members (eight out of seventeen in the case of the Constitutional Court, and five out of seventeen in the case of the Supreme Council of Judges and Public Prosecutors).

- (d) The excessive powers of the President of the Republic are eliminated making the system of government much closer to a classical parliamentary model, although the popular election of the president is maintained.²⁰

Even though the draft is incomparably more democratic and liberal than the present Turkish Constitution, it was met by strong criticism from those sectors of public opinion that are deeply suspicious of the JDP's "hidden intentions." Thus, it was argued that the proposed draft undermined secularism and Atatürk's principles, intended to weaken judicial independence and to politicize the judiciary, thus creating an unchecked majority rule paving the way for gradually introducing an Islamic government. For example, the Union of Turkish Bar Associations reacted by preparing a draft of its own in which they criticised the JDP's constitutional initiative for "opening the door to the revengeful tendencies of a single party government which gives the impression of not being reconciled to the acquisitions of the Republic." The Bar Associations' draft emphasized that it was natural for the Constitution "to bear the traces of an enlightenmentalist world-view." It proposed to put the judiciary above the elected branches of government by granting the Constitutional Court the power to review constitutional amendments both from a procedural and substantive point of view.²¹

The original declared intention of the JDP leadership was to present the draft (after they finalized it) to a fairly long period of societal debate and then to present it to the Parliament as a formal amendment proposal. It was hoped that debates both in the pre-legislative and the legislative stages would make it possible to reach a broader consensus. The final stage would be a referendum regardless of the extent of the majority obtained in parliament. However, the developments that will be spelled out below and possibly some differences of opinion within the JDP itself caused the project to be silently shelved at least for the time being.

The “Headscarf” Amendment and the New Constitutional Crisis

The roots of the headscarf issue go back to the mid-1980s. As a response to the practice of some university administrators not to allow the wearing of headscarves at the universities and the rulings of the Council of State supporting their practice, the then majority party, the MP, passed a law (No. 3511) in 1988 to allow female university students “to cover their hair and their necks because of their religious convictions.” The law was challenged by the then President of the Republic Kenan Evren and the Constitutional Court found it unconstitutional in a highly controversial ruling rendered on 7 March 1989. The Constitutional Court argued that in a secular political system, laws cannot be based upon religious injunctions. In its reasoning the Court defined secularism in terms reminiscent of Comteian positivism. Thus, it was argued, “secularism has separated religiosity and scientific thought” and

speeded up the march toward civilization. In fact, secularism cannot be narrowed down to the separation of religion and state affairs. It is a milieu of civilization, freedom and modernity whose dimensions are broader and whose scope is larger. It is Turkey’s philosophy of modernization, its method of living humanly. It is the ideal of humanity... The dominant and effective power in the state is reason and science, not religious rules and injunctions.²²

Upon the annulment of the law, the MP majority made a second attempt by passing a law (No. 3670) on 25 October 1990 to lift the ban on headscarf wearing at the universities. The new law stipulated that “attire is free at the institutions of higher education so long as it is not against the laws in force.” This time the main opposition party (SDPP) challenged the law before the Constitutional Court. The Court ruled on 9 April 1991 that the law was not unconstitutional, but it had to be interpreted in the light of the Court’s earlier decision. The Court argued that the term “laws in force” also included the Constitution itself, and since it was already established that the wearing of headscarf was against the constitutional principle of secularism, the new law could not and did not abolish the ban.²³ In this ruling, the Constitutional Court used the technique known as “interpretation in conformity with the Constitution.”

The JDP government made no attempt to lift the headscarf ban during its first term of office. Prime Minister Erdoğan and other party spokesmen often stated that there was a social consensus for the lifting of the ban, but not an “institutional consensus,” obviously referring to the opposition of the RPP, the military and the judiciary, and promised that they would seek to obtain institutional consensus as well. Indeed, survey research has shown that over 70 percent of the respondents (76.1 percent in 1999 and 71.1 percent in 2006) were in favor of allowing female university students to wear headscarves.²⁴ An institutional consensus, however, has never materialized.

The headscarf issue, dormant during the first term of the JDP government, suddenly became the number one issue of the political agenda in early 2008. Erdoğan in a press conference in Madrid stated that the ban should be lifted even if the headscarf is used as a “political symbol.” He added that there was no need to wait for the adoption of a new constitution and that the problem could be solved by a simple, “one sentence,” constitutional amendment. The Prime Minister’s statement was strongly criticised by the RPP, but surprisingly supported by the second largest opposition party, the ultra-nationalist NAP. The NAP leader Devlet Bahçeli argued that the ban could be lifted by a change in the constitutional article on equality.²⁵ Following intensive talks between the two parties, they agreed on an amendment proposal concerning Articles 10 and 42 of the Constitution, and the proposal was submitted to the Assembly with the signatures of 278 JDP and 70 NAP deputies.²⁶ The change in Article 10 concerning equality involved the addition of the phrase “in the use of all kinds of public services.” Article 42 on the right to education was also changed by adding a new paragraph: “No one shall be deprived of his/her right to higher education for any reason not explicitly specified by law. The limits on the exercise of this right shall be determined by law.” At the end of the first round of debates, Article 1 was adopted by 401 votes (with 110 opposing deputies) and Article 2 by 404 (with 99 opposing deputies).²⁷ On the second round, both articles received 403 votes, and the entire bill 411 votes.²⁸ It is not clear whether the amendments automatically lifted the ban, or that would require a new implementing legislation. In any case, the RPP and the DLP deputies challenged the constitutional amendment before the Constitutional Court arguing that it was against the unamendable articles of the Constitution (i.e., secularism) and therefore null and void.

On 5 June 2008, the Constitutional Court annulled the amendments. It was clear from the brief official announcement of the Court that its decision was based on the alleged incompatibility of the amendments with the principle of secularism referred to in the unamendable Article 2 of the Constitution. In fact, Article 4 states that the first three articles of the Constitution are unamendable and that no proposal can be made to amend them. On the other hand, Article 148 of the Constitution limits the Court's competence regarding constitutional amendments to a merely procedural (i.e., not substantive) review. Moreover, unlike its predecessor, the Constitution of 1982 explicitly specifies the procedural defects that can be reviewed by the Court. These are the quorums for the proposal (it must be signed by at least one-third of the full membership of the Assembly) and for its adoption (it must be adopted by at least a three-fifths majority), and the requirement that the proposal be debated twice. Article 148 explicitly "limits" the procedural review of the Court to these three dimensions. Since Article 148 is the "special provision" relevant to the case, according to the well-known rule *lex specialis derogat legi generali*, Article 4 cannot be invoked as a basis for broadening the competence of the Court over constitutional amendments.

It is true that the Court reviewed and annulled a number of constitutional amendments during the period of the 1961 Constitution. However, the original text of the 1961 Constitution had no rule on the judicial review over constitutional amendments. As a response to a Constitutional Court ruling that annulled a constitutional amendment in 1970, the Constitution was changed in 1971 to limit the Court's competence to a procedural review. However, unlike the present Constitution, the revised Article 147 did not define the scope of procedural review. Therefore, the Court continued to review constitutional amendments even after the revision. The Court's position was based on the unamendability of the republican form of government under Article 9. The Court argued that the republican form of government also covered the basic characteristics of the republic enumerated in Article 2. Therefore, a constitutional amendment that violated one of those characteristics was also against the unamendable republican principle, and hence the review exercised by the Court was a procedural, not a substantive, review allowed by the Constitution.

These rulings of the Constitutional Court in the 1970s were criticized by a great majority of Turkish constitutional law scholars, since it was obvious that the review exercised by the Court was a substantive, not a procedural, review, which was prohibited to it by the Constitution. To decide on the compatibility of a constitutional amendment with those characteristics of the republic enumerated in Article 2 (a national, democratic, secular, and social state governed by the rule of law) necessarily required a substantive review.

However even this argument of extremely dubious validity cannot be maintained under Article 148 of the 1982 Constitution that explicitly specified and defined the extent of procedural review. The Constitution has no explicit or implicit rule allowing the Court to review the compatibility of a constitutional amendment with the first three unamendable articles of the Constitution. Indeed, under the 1982 Constitution, the Court rejected three requests (one in 1987 and two in 2007) for such review, quoting the provisions of Article 148. Therefore, the recent decision of the Court is not only inconsistent with its earlier rulings, but it also amounts to a “usurpation of power” since it is in violation of the explicit text of Article 148. The resulting situation gives the Court almost total power of control over constitutional amendments. Since the characteristics enumerated in Article 2 and 3 (“a democratic, secular, and social state governed by the rule of law, respectful of human rights, committed to Atatürk nationalism, and based on the principles specified in the Preamble within an understanding of social peace, national solidarity, and justice”) are so vague and broad that almost no constitutional amendment can be conceived that is not one way or another related to one of these characteristics. Thus, this interpretation amounts to an almost complete usurpation of the constituent power by the Constitutional Court which can only be described as an extreme example of “juristocracy.”

After this ruling which made almost any constitutional amendment subject to the approval of the Constitutional Court, the door for a radical constitutional change seems to be closed. The only possible way out of this impasse would be to create a Constituent Assembly with a clear mandate from the people that would make an entirely new, more democratic constitution which, among other things, would redefine the composition and competence of the Constitutional Court.

Notes

- ¹ Constitutional Court's decision, E. 2007/45, K. 2007/54, 1 May 2007, *Resmi Gazete* [Official Gazette], 27 June 2007, No. 26565.
- ² Ergun Özbudun, "Why the Crisis over the Presidency," *Private View*, No. 22 (Autumn 2007), 48–51; Ergun Özbudun, "Cumhurbaşkanı Seçimi ve Anayasa" [The presidential election and the Constitution], *Zaman* (daily), 17 January 2007; and "Anayasa Mahkemesi ve Demokrasi" [The Constitutional Court and democracy], *Zaman* (daily), 3 May 2007.
- ³ *Minutes of the GNAT*, Period 22, Legislative Year 5, Vol. 155, Session 98, 3 May 2007.
- ⁴ *Ibid.*, and Session 105, 10 May 2007.
- ⁵ *Ibid.*, Session 102, 7 May 2007; and Session 105, 10 May 2007.
- ⁶ Serap Yazıcı, *Başkanlık ve Yarı-Başkanlık Sistemleri: Türkiye İçin Bir Değerlendirme* [Presidential and semi-presidential systems: An assessment for Turkey] (Istanbul: İstanbul Bilgi Üniversitesi Yayınları, 2002), 159–63.
- ⁷ Sezer's statement, 25 May 2007, 3/1281, *Minutes of the GNAT*, Period 22, Legislative Year 5, Vol. 159, Session 113, 26 May 2007.
- ⁸ *Ibid.*, Session 118, 31 May 2007.
- ⁹ Constitutional Court decision, E. 2007/72, K. 2007/68, 5 July 2007, *Resmi Gazete* [Official Gazette], 7 August 2007, No. 26606.
- ¹⁰ *Minutes of the GNAT*, Period 22, Legislative Year 5, Vol. 161, Session 119, 1 June 2007.
- ¹¹ *Ibid.*, Period 23, Legislative Year 1, Session 6, 28 August 2007.
- ¹² *Ibid.*, Period 23, Legislative Year 2, Session 6, 10 October 2007; and Session 7, 16 October 2007.
- ¹³ Yüksek Seçim Kurulu Kararı [Supreme Board of Election decision] No. 873, 30 October 2007, <http://www.ysk.gov.tr/ysk/docs/genelge/2007/200-873.htm>.
- ¹⁴ Constitutional Court Decision, E. 2007/99, K. 2007/86, 27 November 2007, *Resmi Gazete* [Official gazette], 19 February 2008, No. 26792.
- ¹⁵ Ergun Özbudun, "Etrafta Uçuşan Anayasa Senaryoları" [Constitutional scenarios flying around], *Zaman* (daily), 29 May 2007; "Anayasa Savaşları" (Constitutional Battles), *Zaman* (daily), 23 August 2007; "Halkoylaması Kaos Yaratır mı?" [Would the referendum lead to chaos?] *Zaman* (daily), 6 October 2007.
- ¹⁶ Özbudun, "Why the Crisis over the Presidency?" 48–49.
- ¹⁷ Ali Çarkoğlu and Binnaz Toprak, *Değişen Türkiye'de Din, Toplum ve Siyaset* [Religion, society, and politics in a changing Turkey] (Istanbul: TESEV, November 2006), 75–76, 87.
- ¹⁸ *Nice Ak Yıllara: Güven ve İstikrar İçinde Durmak Yok, Yola Devam* [To many bright years: Non-stop Ahead in confidence and stability] (Ankara: AK Parti, 2007), 12.

- ¹⁹ The committee was composed of the following law professors: Ergun Özbudun (Chairman), Zühtü Arslan, Yavuz Atar, Fazıl Hüsni Erdem, Levent Köker, and Serap Yazıcı.
- ²⁰ The text of the draft is available in *Legal Hukuk Dergisi*, Year 5, Issue 58, (October 2007), 3177–272. See also: <http://www.ntvmsnbc.com/news/419856.asp>.
- ²¹ *Türkiye Cumhuriyeti Anayasa Önerisi* (Ankara: Türkiye Barolar Birliği, Ekim 2007), 16, 19, 26, 283.
- ²² Constitutional Court decision, E. 1989/1, K. 1989/12, 7 March 1989, *AMKD* (Constitutional Court Reports), No. 25, 133–65, quotation is from p. 147.
- ²³ Constitutional Court Decision, E. 1990/36, K. 1991/8, 9 April 1991, *AMKD* (Constitutional Court Reports), No. 27, Vol. 1, 285–323. For a critique of the Constitutional Court's decisions, see: Mustafa Erdoğan, *Anayasa ve Özgürlük* [The Constitution and liberty] (Ankara: Yetkin Yayınları, 2002), 111–26.
- ²⁴ Çarkoğlu and Toprak, *Değişen Türkiye'de Din, Toplum ve Siyaset*, 71.
- ²⁵ *Milliyet* (daily), 15, 16, 17, 18, 19 January 2008.
- ²⁶ *Milliyet* (daily), 30 January 2008.
- ²⁷ *Minutes of the GNAT*, Period 23, Legislative Year 2, Vol. 13, Session 59, 6 February 2008.
- ²⁸ *Milliyet* (daily), 10 February 2008.

Conclusion

An important aspect of democratic consolidation is the emergence of a widely shared consensus over constitutional norms, i.e., the rules of the game. Thus, argue Linz and Stepan, “constitutionally, a democratic regime is consolidated when governmental and nongovernmental forces alike, throughout the territory of the state, become subjected to, and habituated to, the resolution of conflict within the specific laws, procedures, and institutions sanctioned by the new democratic process.”¹

In most democratic transitions, such consensus over constitutional norms was achieved through “elite settlements” or “elite convergence.” While elite settlements refer to sudden and deliberate negotiated compromises among warring elite functions “that precede or are coterminous with democratic transitions,” elite convergences mean a more gradual bridging of ideological gaps through electoral competition.² Indeed, a large part of the recent literature on transitions to and consolidation of democracy has tended to emphasize the role of political elites. Thus, democratic transitions are seen less as a product of deep-seated structural and cultural factors than as an outcome of negotiations and compromises among rival elite factions, which explains the term *crafting democracies*.³

As was explained in Chapter 1, none of the Republican constitutions of Turkey (those of 1924, 1961, and 1982), not to mention the earlier experiences during the Ottoman Empire, was the product of an elite settlement or elite convergence, in other words of genuine negotiations and compromises among different representative elite factions. None was adopted by a freely chosen Constituent Assembly broadly representing different interests and different values prevalent among the people.

The two most recent constitutions of Turkey (those of 1961 and 1982) were the products of military interventions, made with limited or no input by civilian political forces. Therefore, both enjoyed weak political legitimacy. The Constitution of 1961, theoretically speaking the most democratic and liberal constitution Turkey has ever had, was substantially amended in 1971 and 1973 in a less democratic direction following the partial military intervention of 1971. The leaders of the 1980 intervention excluded all organized political forces from the process of constitution-making and adopted the Constitution with the help of a totally appointed Consultative Assembly. Consequently, the 1982 Constitution strongly reflected the authoritarian, statist and anti-liberal views of its founders.

Small wonder then that the constitution has become a subject of heated debate and controversy following the transition to a civilian government in 1983. The period since then has been marked by fifteen constitutional amendments analyzed in Chapters 2 and 3. The first constitutional amendment of 1987 was a relatively minor one, except for the fact that it submitted the abolition of the ban on the political activities of former leading politicians to a popular referendum. The abolition of the political bans brought about a significant degree of normalcy to Turkish politics.

The process of constitutional reform picked up speed starting from the mid-1990s. The amendments of 1995, while falling short of public expectations, repealed the restrictions on the political activities of civil society institutions and gave political parties a more secure position. The comprehensive constitutional amendments of 2001 and 2004 followed the acceptance of Turkey's candidacy for EU membership at the Helsinki Summit of 1999. No doubt, the prospects of EU membership provided a powerful stimulus for these constitutional reforms as well as the nine harmonization packages. With these reforms, Turkey has sufficiently satisfied the Copenhagen political criteria and started accession negotiations with the EU. It would be wrong to assume, however, that these reforms were simply an outcome of Turkey's desire to join the EU. They also responded to the society's demands for a more democratic and liberal political system. While these fifteen constitutional amendments were significant steps toward liberalization and democratization, it is generally agreed that they have not been able to completely liquidate the authoritarian, sta-

tist, and tutelary spirit of the 1982 Constitution; hence the search for an entirely new constitution described in Chapter 6.

A certain degree of optimism is suggested by the fact that all constitutional reforms in the post-1983 period were the outcome of broad inter-party negotiations and agreements. In none of these cases did a single party hold the two-thirds majority of parliamentary seats required for constitutional amendments. In all of them one or more opposition parties cooperated with the government party or parties to secure the passage of the amendment bill. It may be premature, however, to speak of a genuine elite convergence. The strong reaction shown to the JDP's new constitutional initiative demonstrates that the secular-religious cleavage is still as deep as ever. Turkey seems to be as far away as ever from an elite convergence on this issue, as well as on issues regarding Kurdish demands for cultural rights and regional autonomy. The stability and longevity of a new constitution will depend in large part on the success of political elites to craft reasonable compromises on these two issues.

Notes

- ¹ Juan J. Linz and Alfred Stepan, *Problems of Democratic Transitions and Consolidation: Southern Europe, South America, and Post-Communist Europe* (Baltimore: Johns Hopkins University Press, 1996), 6.
- ² Michael Burton, Richard Gunther, and John Higley, "Elites and Democratic Consolidation in Latin America and Southern Europe," in John Higley and Richard Gunther, eds., *Elites and Democratic Consolidation in Latin America and Southern Europe* (Cambridge: Cambridge University Press, 1992), 323–24, 339.
- ³ See, for example: Giuseppe Di Palma, *To Craft Democracies: An Essay on Democratic Transitions* (Berkeley: University of California Press, 1990).

APPENDIX 1.
Checklist on the Status of Legislative Changes in the Political Criteria Section of the 2001 and 2003 National Program
for the Adoption of the *Acquis*

SUBJECT HEADINGS	CHANGES ENVISAGED	LEGISLATIVE CHANGES REALIZED	STATUS
Freedom of thought and expression	Act No. 3257 on Cinema, Video, and Music Works.	Amendment to Articles 3, 6 and 9 of the Act No. 3257 on Cinema, Video, and Music Works.	✓
	Legislation delineating freedom of expression will be reviewed in the light of the ECHR, especially with regard to the letter and spirit of Articles 10, 17, and 18 of the said Convention.	Amendment to Articles 159, 426, and 427 of the Turkish Penal Code.	✓
	Legislative and administrative measures expanding freedom of expression will be implemented effectively.		
	Measures will be taken to ensure that the freedom of the press will be applied according to universal norms.		
	The provisions on broadcasting in, and learning of different languages and dialects used by Turkish citizens in daily life will be implemented.	Amendment to Articles 4, 15, and 32 of the Act No. 3984 on Radio and Television Broadcasts and adding of one provisional article to this Act.	✓

Checklist on the Status of Legislative Changes in the Political Criteria Section of the 2001 and 2003 National Program for the Adoption of the *Acquis*

SUBJECT HEADINGS	CHANGES ENVISAGED	LEGISLATIVE CHANGES REALIZED	STATUS
	The provisions on broadcasting in, and learning of different languages and dialects used by Turkish citizens in daily life will be implemented.	Amendment to Article 2 of Act No. 2923 on the Education and Teaching of Foreign Languages and the Learning of Different Languages and Dialects by Turkish Citizens.	✓
		The bylaw on the learning of languages and dialects used traditionally by Turkish citizens in their daily lives (OG No. 25307, 05.12.2003).	✓
		The bylaw on the broadcasts in languages and dialects used traditionally by Turkish citizens in their daily lives (OG No. 25357, 25.01.2004).	✓
	Training of members of the judiciary on human rights, the European Convention on Human Rights, and the jurisprudence of the European Court of Human Rights will be continued and expanded to ensure consistency in implementation.	Act on the Establishment of the Justice Academy.	✓
		Training programs undertaken at the Ministry of Justice.	✓

**Checklist on the Status of Legislative Changes in the Political Criteria Section of the 2001 and 2003 National Program
for the Adoption of the *Acquis***

SUBJECT HEADINGS	CHANGES ENVISAGED	LEGISLATIVE CHANGES REALIZED	STATUS
Freedom of association and the right to peaceful assembly and civil society	Other	Amendment to Article 55/A and 149/A of the Act No. 298 on Basic Provisions on Elections and Voters' Registrars.	✓
		Amendment to Article 1 of the Anti-terrorism Act No. 3713, and adding one provisional article, the repeal of Article 8 and amendment to Article 7 of this Act.	✓
	Legislation concerning associations as well as meetings and demonstrations will be reviewed. Provisions in various legislation will be collected into as few laws as possible to provide consistency.	Amendment to Articles 1, 4, 8, 10, 16, 17, 31 and 38 of the Act No. 2908 on Associations and the repeal of Articles 16/4., 31/final paragraph and Article 83 of this Act.	✓
		Amendment to Articles 56, 64, 66, and 82 of the Turkish Civil Code and repeal of Article 94/2 of this Act.	✓
		Amendment to Supplementary Article 3 of Decree Law No. 227 on the Establishment and Duties of the Directorate General for Foundations.	✓
		Adding one provisional article to Act No. 2762 on Foundations.	✓
		The Law on Relationship of Associations and Foundations with Public Institutions (Adopted by GNAT on 22.01.2004) (OG No.25361, 29.01.2004).	✓

Checklist on the Status of Legislative Changes in the Political Criteria Section of the 2001 and 2003 National Program for the Adoption of the *Acquis*

SUBJECT HEADINGS	CHANGES ENVISAGED	LEGISLATIVE CHANGES REALIZED	STATUS
Freedom of association and the right to peaceful assembly and civil society	The legislative and administrative reforms concerning associations, foundations, meetings, and demonstration marches will be implemented effectively.	Amendment to Articles 15, 16, 17, 18, and 19 of the Act No. 2911 on Meetings and Demonstration Marches.	✓
		Ministry of Interior Circular, dated 05.12.2003, on the implementation of amendments to the Act on Meetings and Demonstration Marches and Ministry of Interior Circular, dated 09.01.2004, on the international activities of the foundations established in Turkey as well as the activities of the foundations established abroad and foreign non-profit organizations in Turkey.	✓
Prevention of torture and maltreatment	Allegations of torture and maltreatment will be investigated immediately and thoroughly, and the offenders will be punished rapidly.	Adding one article to the Code of Criminal Procedure, No. 1412.	✓
		Ministry of Justice Circular, dated 20.10.2003, on the investigation of such allegations as urgent matters to be addressed without delay.	✓
	Provisions on the rights of persons arrested, detained, or charged to communicate with their lawyers and inform their relatives will be fully implemented.	Changing the heading of Article 16 of the Act No. 2845 on the State Security Courts.	✓
		Repeal of Article 31/1 of the Act No. 3842 Amending Some Articles of the Code of Criminal Procedure and the Act on State Security Courts.	✓

**Checklist on the Status of Legislative Changes in the Political Criteria Section of the 2001 and 2003 National Program
for the Adoption of the *Acquis***

SUBJECT HEADINGS	CHANGES ENVISAGED	LEGISLATIVE CHANGES REALIZED	STATUS
Prevention of torture and maltreatment	Modern investigation techniques and medical monitoring systems to prevent maltreatment and human rights violations will be implemented effectively.	The bylaw amending some articles of the Bylaw on Apprehension, Detention and Interrogation (OG No.25335, 03.01.2004).	✓
	Human rights training for law enforcement officials will be intensified and expanded.		
	Implementation of the measures in the Code of Penal Procedure and the Bylaw on Apprehension, Detention, and Interrogation will be monitored effectively and immediate legal action will be taken against those failing to comply with their provisions.	Ministry of Justice Circular, dated 29.09.2003, on the conduct of preparatory investigation personally by the Public Prosecutor.	✓
	The recourse mechanism against responsible personnel for the compensations paid in compliance with the decisions of the ECtHR on cases of torture or inhumane or degrading treatment will be applied effectively.		

Checklist on the Status of Legislative Changes in the Political Criteria Section of the 2001 and 2003 National Program for the Adoption of the *Acquis*

SUBJECT HEADINGS	CHANGES ENVISAGED	LEGISLATIVE CHANGES REALIZED	STATUS
Training of public servants on human rights	The ongoing human rights training of public officials, especially members of the judiciary and law enforcement officials, will be expanded, and training programs designed to raise awareness on ECHR and ECtHR case law, as well as EC law, will be developed further.		
The functioning and the effectiveness of the judiciary	Act on the Establishment and Trial Procedures at Military Courts.	Article 11 of the Act on the Establishment and Trial Procedures at Military Courts.	✓
		Act amending the Military Criminal Code and the Act on the Establishment and Trial Procedures of Military Courts (Adopted by GNAT on 22.01.2004) (OG No.25361, 29.01.2004).	✓
	Entrenchment of the principle of the rule of law in Turkey, as it exists in modern nations that embrace such universal values.		
	Provision of effective justice required by modern society.		
	Reform of the judiciary.		

**Checklist on the Status of Legislative Changes in the Political Criteria Section of the 2001 and 2003 National Program
for the Adoption of the *Acquis***

SUBJECT HEADINGS	CHANGES ENVISAGED	LEGISLATIVE CHANGES REALIZED	STATUS
The functioning and the effectiveness of the judiciary	Ongoing training programs on human rights and ECHR and ECtHR case law, designed to provide conformity in implementation, will continue in a broadened manner encompassing members of high courts.		
	Other.	Amendment to Article 6 of the Act No. 2253 on the Establishment, Duties, and Proceedings of Juvenile Courts and the repeal of Article 6/final paragraph.	✓
		Amendment of the Act No. 2253 on the Establishment, Duties and Proceedings of Juvenile Courts (OG No.25345, 13.01.2004).	✓
		Adding one Supplementary article to Act No. 832 on the Court of Audit.	✓
Abolition of the death penalty	Abolition of the death penalty in Turkish Criminal Law with the exception of war and the imminent threat of war.	Amendment to Article 1/A of the Act No. 4771 Amending Some Acts (death penalties in the Turkish Criminal Code, Act No. 1918 on the Pursuit and Interdiction of Smuggling, Act No. 6831 on Forests, and Act No. 4533 on the Gelibolu Historical National Park were abolished).	✓

Checklist on the Status of Legislative Changes in the Political Criteria Section of the 2001 and 2003 National Program for the Adoption of the *Acquis*

SUBJECT HEADINGS	CHANGES ENVISAGED	LEGISLATIVE CHANGES REALIZED	STATUS
Abolition of the death penalty	Abolition of the death penalty in Turkish Criminal Law with the exception of war and the imminent threat of war.	Act Amending the Military Criminal Code and the Act on the Establishment and Trial Procedures of Military Courts (Adopted by GNAT on 22.01.2004) (OG No.25361, 29.01.2004).	✓
Conditions in prisons and detention houses and in custody	Ensure the effective implementation of the measures adopted for the improvement of conditions in prisons and detention houses.		
	Continue the alignment of prisons standards with international standards, in light of the recommendations of the Council of Europe and the Committee for the Prevention of Torture.		
	Continue the effective functioning of the Judges of Enforcement and Prison Monitoring Boards.	Ministry of Justice Circular, dated 25.12.2003, on the confidentiality of written application submitted to the judges of enforcement.	✓
	Continue to review legislation on the execution of sentences.	Repeal of Article 16 of the Act No. 2845 on State Security Courts.	✓

**Checklist on the Status of Legislative Changes in the Political Criteria Section of the 2001 and 2003 National Program
for the Adoption of the *Acquis***

SUBJECT HEADINGS	CHANGES ENVISAGED	LEGISLATIVE CHANGES REALIZED	STATUS
Full enjoyment by all individuals without any discrimination irrespective of their language, race, color, sex, political opinion, philosophical belief or religion of all human rights	The legislation concerning freedom of worship will be simplified in implementation in light of the ECHR and its Additional Protocol No. 1, with a view to addressing the needs of different religions and faiths.	Amendment to Act on Construction. Ministry of Interior Circular, dated 24.09.2003, on the designation of places of worship on municipal settlement plans.	✓
	The provisions on the learning of and the broadcasting in different languages and dialects used by Turkish citizens in their daily lives will be implemented.	See "Freedom of Expression" (fourth line).	
	Appropriate measures will be taken in line with the ILO Convention No. 159 for the Vocational Rehabilitation and Employment for Disabled Persons.		
	Emphasis will be given to the application of the ILO Convention for Prevention of the Worst Cases of Child Labor.		

Checklist on the Status of Legislative Changes in the Political Criteria Section of the 2001 and 2003 National Program for the Adoption of the *Acquis*

SUBJECT HEADINGS	CHANGES ENVISAGED	LEGISLATIVE CHANGES REALIZED	STATUS
		Amendment to Article 16 of the Act No. 1587 on the Act on Census.	✓
		Ministry of Interior Circular instructing census bureaus to register names given to their children by parents in accordance with the amendment to Article 16 of the Act on Census.	✓
		Amendment to Article 453 of the Turkish Criminal Code.	✓
		Prime Ministry Circular dated 22.01.2004 on respect for the principle of gender equality for recruitment to public service.	✓
		Prime Ministry Circular dated 24.01.2004 on ensuring the exercise of the right of petition and the right to information.	✓
		Amendments to Articles 4, 5, 13 and 15 of the Act No. 2945 on the National Security Council and the Secretariat General of the National Security Council, adding of a provisional article to this Act and the repeal of Articles 9, 14, and 19.	✓
Functionality of the executive	The consultative status of the National Security Council (NSC) was redefined through constitutional and legislative amendments. The functions of the NSC and the Secretariat-General of the NSC shall be harmonized with this definition.		

**Checklist on the Status of Legislative Changes in the Political Criteria Section of the 2001 and 2003 National Program
for the Adoption of the *Acquis***

SUBJECT HEADINGS	CHANGES ENVISAGED	LEGISLATIVE CHANGES REALIZED	STATUS
Functionality of the executive	The consultative status of the National Security Council (NSC) was redefined through constitutional and legislative amendments. The functions of the NSC and the Secretariat-General of the NSC shall be harmonized with this definition.	Amendment to Article 1 of the Act No. 2451 on Appointment Procedures at Ministries and Affiliated Agencies.	✓
		The Bylaw on the Secretariat General of the National Security Council (OG No. 25340, 08.01.2004).	✓
		Act No.5017 repealing the articles on the confidentiality of the Staff of and the Bylaw on the Secretariat General of the NSC (OG No.25319, 17.12.2003).	✓
Conventions	Signing of the Optional Protocol of the International Covenant on Civil and Political Rights.	Signed on 03.02.2004.	✓
	Signing of Additional Protocol No. 13 to the European Convention on Human Rights.	Signed on 09.01.2004.	✓

Source: Secretariat General for EU Affairs, Ministry of Foreign Affairs, <http://www.abgs.gov.tr>, 09.02.2004.

APPENDIX 2.**Laws Adopted by the EU Harmonization Packages**

FIRST HARMONIZATION PACKAGE	
Law No. 4744 adopted on 6 February 2002	
Official Gazette No. 24676, 19 February 2002	
Amended Laws:	Articles
Law on Penal Trial Procedure	107 and 128
Law on the Establishment and Trial Procedure of the State Security Courts	16
Turkish Penal Code	159 and 312
Anti-Terror Law	7 and 8

SECOND HARMONIZATION PACKAGE	
Law No. 4748 adopted on 26 March 2002	
Official Gazette No. 24721, 9 April 2002	
Amended Laws:	Articles
Press Law	16, Additional Articles 1 and 2
Law on Associations	4, 5, 6, 7, 11, 12, 34, 38, and 43
Law on the Establishment and Trial Procedure of the State Security Courts	16
Law on Civil Servants	13
Law on Provincial Administration	29
Law on the Organization, Duties and Competences of the Gendarmerie	9
Law on Political Parties	101, 102, and 103
Law on Meetings and Demonstration Marches	9, 17, 19, and 21

THIRD HARMONIZATION PACKAGE	
Law No. 4771 adopted on 3 August 2002	
Official Gazette No. 24841, 9 August 2002	
Amended Laws:	Articles
Press Law	5, 21, 22, 24, 25, 30, 31, 34, Additional Article 3
Law on Penal Trial Procedure	327 and 335

Law on Associations	11, 12, 15, 39, 40, 45, 46, 47, 56, 62, and 73
Law on Civil Trial Procedure	445 and 448
Law on the Establishment and Broadcast of Radio and Television Enterprises	4 and 26
Law on the Duties and Competencies of the Police	8, 9, 11, 12, 13, and Additional Article 1
Law on Meetings and Demonstration Marches	3 and 10
Turkish Penal Code	159, Death penalty was converted to heavy imprisonment
Law on Foundations	1
Decree on the Organization and Duties of the General Directorate of Foundations	Additional Article 3
Law on Free Zones	Provisional Article 1
Law on Foreign Language Teaching and Education	1 and 2
Law on Prevention and Pursuit of Smuggling	Death penalty was converted to heavy imprisonment
Law on Forestry	Death penalty was converted to heavy imprisonment

FOURTH HARMONIZATION PACKAGE

Law No. 4778 adopted on 2 January 2003	
Official Gazette No. 24990, 11 January 2003	
Amended Laws:	Articles
Law on Criminal Records	5 and 8
Press Law	15
Law on Penal Trial Procedure	316
Law on the Establishment and Trial Procedure of the Juvenile Court	34
Law on Stamp Duties	Additional Article 1
Law on Associations	5, 6, 11, 12, 16, 18, and 44
Law on the Establishment and Trial Procedure of the State Security Courts	16/4

Law Concerning the Use of the Right to Petition	1, 2, 3, 4, 7, and 8
Law on the Human Rights Investigation Commission	7
Law on Elections for Local Administration, Neighborhood Headmen and Elder Councils	8
Law on Trial of Civil Servants and Other Public Employees	2
Law on Deputies Elections	7, 11, and 39
Decree on the Governorship and Measures to be Taken During a State of Emergency	3/c
Law on Political Parties	8, 11, 66, 98, 100, 102, 104, and 111
Turkish Penal Code	245
Turkish Civil Code	91 and 92
Law on Foundations	1

FIFTH HARMONIZATION PACKAGE

Law No. 4793 adopted on 23 January 2003

Official Gazette No. 25014, 4 February 2003

Amended Laws:	Articles
Law No. 4771 Concerning the Amendment to Miscellaneous Laws to the ECHR)	Provisional Article 2 (Appeal)
Law on Penal Trial	327/a and 335
Law on Associations	82
Law on Civil Trial Procedure	445, 445/A, 447. and 448

SIXTH HARMONIZATION PACKAGE

Law No. 4928 adopted on 15 July 2003

Official Gazette No. 25173, 19 July 2003

Amended Laws:	Articles
Law on Criminal Records	9
Law No. 4771 Concerning the Amendment to Miscellaneous Laws	1/A (death penalty)
Law Concerning the Amendments to Law on Penal Trial Procedure and the Establishment and Trial Procedure of the State Security Courts	31

Law on the Establishment and Trial Procedure of the State Security Courts	16
Law on Administrative Trial Procedure	53 and Provisional Article 5
Law on Public Works	Additional Article 2
Law on Census-taking	16
Law on the Establishment and Broadcast of the Radio and Television Enterprises	4, 15, 32, and Provisional Article 10
Law on the Fundamental Principles of Elections and Electoral Registry	55/A and 149/A
Law on Cinema, Video, and Music Works	3, 6 and 9
Anti-Terror Law	1, 8, and Provisional Article 10
Turkish Penal Code	453 and 462
Law on Foundations	1

SEVENTH HARMONIZATION PACKAGE	
Law No. 4963 adopted on 30 July 2003	
Official Gazette No. 25192, 7 August 2003	
Amended Laws:	Articles
Law on the Establishment and Trial Procedure of Military Courts	11
Law Concerning the Appointment Procedure of Ministries and Affiliated Organizations	Chart No. 1
Law on Penal Trial Procedure	Additional Article 7
Law on the Establishment and Trial Procedure of the Juvenile Court	6
Law on Associations	1, 4, 8, 10, 16, 17, 31, 38, and 83
Law on the National Security Council and the Secretariat of National Security Council	4, 5, 9, 13, 15, 19, and Provisional Article 4
Law on Audit Court	Additional Article 12
Anti-Terror Law	7
Law on Meetings and Demonstration Marches	15, 16, 17, 18, and 19
Turkish Penal Code	159, 169, 426, and 427

Turkish Civil Code	56, 64, 66, 82, and 94
Decree on the Organization and Duties of the General Directorate of Foundations	Additional Article 3
Law on Foreign Language Teaching and Education	2

EIGHTH HARMONIZATION PACKAGE	
Law No. 5218 adopted on 14 July 2004	
Official Gazette No. 25529, 21 July 2004	
Amended Laws:	Articles
Law Concerning the Public Order and Prevention of Assault and Battery	1
Law on Attorneyship	65 and Additional Article 3
Law on Execution of Penalties	1, 2, 19, Additional 2, Provisional 11, and 12
Law on Penal Trial Procedure	110, 283, 305, and 421
Regulation on the Policing Procedure of Railways	1 and 2
Law on Gallipoli Peninsula Historic National Park	6
Law Concerning the Publication and Date of Effectiveness of Laws and Regulations	1
Law on the Protection of Minors from Harmful Publications	2
Law on the Establishment and Trial Procedure of the Juvenile Court	12
Law on Forestry	110
Law on the Establishment and Broadcast of the Radio and Television Enterprises	6
Law on Wireless	6
Anti-Terror Law	17
Turkish Penal Code	11, 12, 13, 17, 43, 47, 50, 51, 54, 55, 58, 59, 61, 62, 64, 65, 66, 70, 73, 82, 102, 112, 118, 125, 126, 127, 129, 131, 133, 136, 137, 146, 147, 156, 285,

	286, 296, 301, 302, 303, 305, 407, 450, 451 and 463
Law on Higher Education	6
Law No. 4771 Concerning the Amendment to Miscellaneous Laws	1 (death penalty)

NINTH HARMONIZATION PACKAGE
Current Status (as of 6 June 2008)

Law on Foundations (new law) on 20 February 2008	Adopted by the parliament
Law on Settlement on 19 September 2006	Adopted by the parliament
Draft Law on Audit Court	Obsolete
Law on Private Educational Institutions	Adopted by the parliament on 8 February 2007
Law on Public Auditor (Ombudsman)	Stay of execution by the Constitutional Court
Law Concerning the Amendments to the Law on the Establishment and Trial Procedure of the Military Courts	Adopted by the parliament on 29 June 2006
Draft Law Concerning the Amendments to the Law on Administrative Trial Procedure	At the Office of the Prime Minister
Draft Law on General Administrative Legal Procedure	At the Ministry of Justice
Draft Law Concerning the Establishment of Political Ethics Commission and Amendments to Some Laws	At the Ministry of Justice
Draft Law Concerning the Amendments to the Law on Fundamental Principles of Elections and Electoral Registry	At the Ministry of Justice
Reorganization of the Presidency of Human Rights of the Prime Ministry	In progress
Establishment of a new institution in the field of anti-corruption Ratification of UN Convention Against Corruption	A circular was issued on 12 October 2006 18 May 2006

Ratification of Protocol No. 14 Amending the Control System Mechanism of the Convention for the Protection of Human Rights and Fundamental Freedoms	1 June 2006
Ratification of the Revised European Social Charter	27 September 2006
Ratification of the Protocol Amending the European Social Charter	27 September 2006

Source: Republic of Turkey Ministry of Foreign Affairs, Secretariat General for EU Affairs, Political Reforms in Turkey, Ankara, 2007 and Information Note on the 9th Harmonization Package, 6 June 2008.

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The Turkish experience in constitution-making can be described as a series of missed opportunities to create political institutions based on broad consensus. None of the three republican constitutions (those of 1924, 1961, and 1982), nor the Ottoman Constitution of 1876 was written by a Constituent or a Legislative Assembly broadly representative of social forces or through a process of negotiations, bargaining, and compromise. Consequently, they all had weak political legitimacy. No doubt, the prospects of EU membership provided a powerful stimulus for these constitutional reforms as well as the nine harmonization packages. With these reforms, Turkey has sufficiently satisfied the Copenhagen political criteria and started accession negotiations with the EU. It would be wrong to assume, however, that these reforms were simply an outcome of Turkey's desire to join the EU. They also responded to the society's demands for a more democratic and liberal political system.

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